Supreme Court, U.S.
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No. 10-284

In The
Supreme Court of the United States

CITY OF COLTON,

Petitioner,

v.

AMERICAN PROMOTIONAL EVENTS, INC. – WEST, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit held that the declaratory judgment provision in section 113(g)(2) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") preempts the Declaratory Judgment Act as applied in the CERCLA context, and that section 113(g)(2) does not authorize CERCLA plaintiffs to assert declaratory relief claims for future cleanup costs if they cannot recover past cleanup costs. Therefore, the Ninth Circuit concluded, the plaintiff could not assert a declaratory relief claim under the Declaratory Judgment Act for its future cleanup costs, because it did not have the right to recover its past cleanup costs. The Ninth Circuit acknowledged, however, that the plaintiff's declaratory relief claim met the justiciability standards of the Declaratory Judgment Act. The Ninth Circuit acknowledged that a conflict exists among the federal circuit courts concerning whether declaratory relief claims can be asserted for future cleanup costs if past cleanup costs cannot be recovered, and that its decision conflicts with circuit court decisions holding that such claims can be asserted.

The question presented is:

Whether the declaratory judgment provision of section 113(g)(2) of CERCLA preempts the Declaratory Judgment Act as applied in the CERCLA context, thus precluding CERCLA plaintiffs from asserting declaratory relief claims for future cleanup costs if they cannot recover past cleanup costs.

PARTIES TO THE PROCEEDINGS

The petitioner and plaintiff is the City of Colton, a municipal corporation located in San Bernardino County, California.

The respondents and defendants are: American Promotional Events, Inc.-West; Apollo Manufacturing Co.; Astro Pyrotechnics, Inc.; Atlas Fireworks Company, Inc.; Black & Decker, Inc.; California Fireworks Display Company; County of San Bernardino; Emhart Industries, Inc.; Goodrich Corporation; Kwikset Locks, Inc.; Pyro Spectaculars, Inc.; Pyrotronics Corp.; Red Devil Fireworks Company; Thomas O. Peters; The 1966 Thomas O. Peters and Kathleen S. Peters Revocable Trust; Trojan Fireworks, Co.; United Fireworks Manufacturing Company, Inc.; and Whittaker Corporation.

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The Ninth Circuit decision has been certified for publication but has not yet been officially reported, and is reproduced at Appendix 1. The district court decision is reproduced at Appendix 20.

JURISDICTION

The Ninth Circuit issued its judgment on August 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Section 113(g) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9613(g), is reproduced at Appendix 49. Subsection (2) thereof provides, in part:

> In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.

42 U.S.C. § 9613(g)(2); App. 50.

The Declaratory Judgment Act of 1934, 28 U.S.C. § 2201, provides:

> (a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party, whether or not further relief is or could be sought. Any such declaration shall have the full force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

A. General

The City of Colton ("Colton") brought an action against several defendants under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), alleging that the defendants had caused a hazardous substance, perchlorate, to contaminate Colton's drinking water supply. Colton's complaint sought (1) recovery of Colton's past response costs in removing the contaminant from its drinking water supply, and (2) a declaratory judgment under the Declaratory Judgment Act authorizing Colton to recover its future response costs in removing the contaminant. The district court held that Colton could not recover its past response costs – because it had not complied with the National Contingency Plan ("NCP"), as required by CERCLA – and that, because Colton

could not recover its past response costs, it could not obtain a declaratory judgment authorizing recovery of its future response costs.

On appeal, Colton conceded that it could not recover its past response costs under CERCLA – because it had not complied with the NCP – but argued that it was entitled to a declaratory judgment under the Declaratory Judgment Act for its future response costs, if it complied with the NCP in its future response action.

The Ninth Circuit held that Colton's declaratory relief claim presented an "actual controversy" within the meaning of the Declaratory Judgment Act and thus was ripe for review. The court held, however, that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied in the CERCLA context, and precludes a declaratory judgment for future response costs if past response costs cannot be recovered. The court concluded that since Colton cannot recover its past response costs, it cannot obtain a declaratory judgment for its future response costs.

B. Statutory and Regulatory Background

Under CERCLA, a party who has incurred costs – generally referred to as "response costs" – in cleaning up a contaminated site may, under defined circumstances, recover its costs from parties responsible for the contamination. Section 107(a) authorizes recovery of (1) response costs of "removal or remedial action" incurred by the federal government, a state,

or an Indian tribe "not inconsistent with the national contingency plan," and (2) "all other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. §§ 9607(a)(4)(A), -(B). Colton's cost recovery action in this case falls within the second category, *i.e.*, a cost recovery action by "any other person." Under section 107(a), a cost recovery action can be brought against any person included in the definition of "covered persons," who are generally referred to as "potentially responsible parties" ("PRP"). *See United States v. Atlantic Research Corp.*, 551 U.S. 128, 131-133 (2007); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 160-163 (2004).[1]

Section 113(g)(2) of CERCLA provides for a mandatory declaratory judgment in actions brought under section 107(a) for recovery of response costs. Section 113(g)(2) states:

> In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent

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[1] CERCLA lists four categories of "covered persons," which generally include (1) the "owner or operator" of the facility, (2) any person who "owned or operated" the facility when the hazardous substances were disposed of, (3) any person who arranged for disposal, treatment or transportation of the hazardous substances, and (4) any person who "accepted" the hazardous substances for transport to the disposal or treatment facilities. 42 U.S.C. § 9607(a)(1)-(4).

> action or actions to recover further response costs or damages.

42 U.S.C. § 9613(g)(2); App. 50.

As noted above, CERCLA section 107(a) authorizes private parties to recover costs for removal and remedial actions that are "consistent with" the NCP. 42 U.S.C. § 9607(a). The NCP consists of regulations adopted by the Environmental Protection Agency (EPA) describing procedures that parties must follow in undertaking removal and remedial actions. *Id.* at §§ 9601(31) (defining "national contingency plan"), 9601(23) (defining "removal" action), 9601(24) (defining "remedial" action). *See Cooper Industries, Inc. v. Aviall Services,* 543 U.S. 157, 162 n. 2 (2004); *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1227 n. 3 (9th Cir. 2006). "Removal" actions are generally regarded as "time-sensitive responses" to public health threats, and "remedial" actions are generally regarded as "permanent remedies to threats for which an urgent response is not warranted." *W.R. Grace*, 429 F.3d at 1227-1228.[2]

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[2] The *Grace* court recognized, however, that the distinction between removal and remedial actions is "inescapably vague" and that there is "overlap" between the two actions. *Id.* at 1239, 1241. As the court noted, "the triggering factors [for a remedial action] begin to sound virtually similar to the triggering factors for a 'removal' action. In fact, two of the triggering factors for 'removal' are almost identical to the factors for 'remedy.'" *Id.* at 1238.

C. Procedural Background

Colton filed a complaint against several defendants, alleging that the defendants had caused a hazardous substance, perchlorate, to contaminate the Rialto/Colton Groundwater Basin in San Bernardino County, California, which is a major source of Colton's drinking water supply. App. 6, 21. The complaint alleged that Colton had incurred past response costs of more than $4 million in removing the contaminant from the Basin, and that the defendants were liable under CERCLA section 107(a) for Colton's past response costs in removing the contaminant. App. 6-7, 22-26. The complaint also alleged that Colton intended to incur future response costs in continuing to remove the contaminant from the Basin, and that Colton was entitled to a declaratory judgment under the Declaratory Judgment Act stating that the defendants are liable for Colton's future response costs. App. 7, 21.

The district court granted the defendants' motion for summary judgment and dismissed Colton's action. App. 7, 46. The district court held that Colton was not entitled to recover its past response costs because Colton had not established that its past costs were necessary and consistent with the NCP. App. 8, 29-42. The district court held that since Colton could not recover its past response costs, it was not entitled to a declaration under the Declaratory Judgment Act that Colton was entitled to recover its future response costs. App. 8, 42 n. 16.

D. The Ninth Circuit Decision

On appeal, Colton conceded that it could not recover its past response costs under CERCLA section 107(a) because it had not complied with the NCP in its past response action. App. 8. Colton argued, however, that it was entitled to a declaration under the Declaratory Judgment Act that Colton could recover its future response costs, if Colton complied with the NCP in its future response action. App. 9.

The Ninth Circuit held that Colton's declaratory relief claim under the Declaratory Judgment Act was ripe for review. App. 9-11. The court stated that a declaratory relief claim under the Declaratory Judgment Act is ripe if there is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." App. 9-10 (citation and quotation marks omitted). The court held that Colton's declaratory relief claim met this standard because "the facts establishing Colton's right to declaratory relief have already occurred because there is no dispute that there is perchlorate contamination of the Basin," and there is "no dispute that Colton has incurred costs in responding to the contamination, and that Colton will incur additional costs in the future." App. 11.[3]

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[3] The Ninth Circuit also held that Colton's declaratory relief claim was not moot, App. 11-13, and that the court had subject matter jurisdiction over the claim. App. 13-14.

The Ninth Circuit held, however, that Colton could not assert its declaratory relief claim under the Declaratory Judgment Act, because that Act was preempted by the declaratory judgment provision in CERCLA section 113(g)(2), and the latter provision does not authorize a declaratory judgment for future response costs if the plaintiff does not have the right to recover past response costs. App. 14-19.

In holding that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act, the Ninth Circuit stated:

> Although Colton's complaint referred to the Declaratory Judgment Act rather than CERCLA section 113(g)(2), the latter provision clearly governs this initial cost-recovery action. Because "a precisely drawn, detailed statute *pre-empts* more general remedies," *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks omitted), we must consider whether Colton was entitled to declaratory relief under CERCLA's more detailed declaratory relief provision.

App. 16 (emphasis added).

In holding that CERCLA section 113(g)(2) precludes a declaratory relief claim for future response costs if past response costs cannot be recovered, the Ninth Circuit stated:

> The declaratory judgment mandated by section 113(g)(2) pertains to "liability for response costs." 42 U.S.C. § 9613(g)(2). Such "liability for response costs" must refer to the

> response costs sought in the initial cost-recovery action, given that the sentence later refers to "any *subsequent* action or actions to recover *further* response costs." *Id.* (emphasis added). Therefore, if a plaintiff successfully establishes liability for the response costs sought in the initial cost-recovery action, it is entitled to a declaratory judgment on present liability that will be binding on future cost-recovery actions. [¶] Here, Colton has failed to establish present liability because of its conceded failure to comply with the NCP but seeks a declaratory judgment on *future* liability. Section 113(g)(2), however, does not provide such relief. . . . [D]eclaratory relief is available [under section 113(g)(2)] only if liability for past costs has been established under section 107.

App. 16-17 (original emphasis).

In summary, the Ninth Circuit held that Colton's declaratory relief claim under the Declaratory Judgment Act was ripe for review – because "the facts" establishing Colton's claim for future response costs "have already occurred," and there is "no dispute" that Colton had incurred past costs and "will incur additional costs in the future" – but that Colton could not assert its declaratory relief claim because CERCLA section 113(g)(2) preempted the Declaratory Judgment Act as applied in the CERCLA context, and Colton could not assert declaratory relief under section 113(g)(2) because it could not recover past costs.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents a significant question concerning the relationship between two prominent, widely-applied federal statutes – the Declaratory Judgment Act, 28 U.S.C. § 2201, and CERCLA, 42 U.S.C. § 9607 *et seq*. The question is whether the declaratory relief provision of CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied in the CERCLA context, and thus precludes CERCLA plaintiffs from asserting declaratory relief claims for future response costs if they cannot recover past response costs, even though their declaratory relief claims meet the justiciability requirements of the Declaratory Judgment Act. The question whether the CERCLA provision preempts the Declaratory Judgment Act is an important question of federal law that has not been, but should be, decided by this Court, and is appropriate for this Court's review under Supreme Court Rule 10(c).

The Ninth Circuit acknowledged that there is a conflict among the federal circuit courts concerning this question. The court stated that the Eighth, Second and Third Circuits have held that CERCLA plaintiffs *cannot* assert declaratory relief claims for future response costs if they cannot recover past response costs, and that the First and Tenth Circuits have held that CERCLA plaintiffs *can* assert such declaratory relief claims. The Ninth Circuit, stating that the issue is one of "first impression" in the Ninth

Circuit, adopted the position of the circuit courts holding that such declaratory relief claims *cannot* be asserted, thus acknowledging that its decision conflicts with circuit court decisions holding that such declaratory relief claims *can* be asserted. Because of the conflict among the circuit courts, this case is appropriate for this Court's review under Supreme Court Rule 10(a).

The Ninth Circuit held that plaintiff Colton's declaratory relief claim meets the "actual controversy" requirements of the Declaratory Judgment Act and thus is justiciable under that Act. The Ninth Circuit held, however, that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied to declaratory relief claims under CERCLA, and that section 113(g)(2) precludes the assertion of a declaratory relief claim for future response costs if the plaintiff cannot recover past costs. The court concluded that – since Colton cannot recover its past response costs because it did not comply with the NCP in its past response action – Colton cannot assert a declaratory relief claim for future response costs.

Contrary to the Ninth Circuit decision, CERCLA section 113(g)(2) does not preempt the Declaratory Judgment Act as applied in the CERCLA context. Section 113(g)(2) mandates a declaratory judgment on liability for future cleanup costs if the plaintiff has established its claim for recovery of past cleanup costs. The purpose of the mandatory declaration is to obviate the need for the plaintiff, after having established its claim for past costs, to re-litigate the

liability issue in subsequent actions for future costs. Section 113(g)(2) does not apply where, as here, the plaintiff has *not* established its claim for past costs, and therefore must establish its claim in its future cost recovery action. If the plaintiff has not established its past cost recovery claim, there is no basis for precluding re-litigation of the claim and thus no basis for the mandatory declaration authorized under section 113(g)(2).

Thus, CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently in the CERCLA context. Section 113(g)(2) mandates declaratory judgments for plaintiffs who establish the defendant's liability, and the Declaratory Judgment Act authorizes declaratory judgments for plaintiffs who do not establish the defendant's liability but whose claims meet the justiciability requirements of the Declaratory Judgment Act. CERCLA section 113(g)(2) expands the rights of plaintiffs to obtain declaratory relief, by providing for mandatory declarations where liability has been established, but does not reduce the existing rights of plaintiffs to secure declaratory relief under the Declaratory Judgment Act, where they would otherwise qualify for such relief.

Since CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently in the CERCLA context, they can be construed harmoniously so that effect is given to each. "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective." *Morton v. Mancari*,

417 U.S. 535, 549 (1974). Congress provided no indication, in enacting section 113(g)(2), that the provision was intended to preempt the Declaratory Judgment Act, and the provision itself reveals no such congressional intent. Since the CERCLA provision and the Declaratory Judgment Act can be read harmoniously and Congress provided no indication of a preemptive intent, the CERCLA provision cannot properly be construed as preempting the Declaratory Judgment Act.

The Ninth Circuit decision, by holding that CERCLA preempts the Declaratory Judgment Act, categorically precludes the assertion of declaratory relief claims under the Declaratory Judgment Act for CERCLA cost recovery, no matter how compelling the evidence in support of the claims, and even though the declaratory relief claims concededly meet the "actual controversy" requirements of the Declaratory Judgment Act. The decision obstructs the broad goal of the Declaratory Judgment Act to provide a mechanism for parties to obtain a declaration of their rights before their actual causes of action have fully accrued under substantive statutes. The decision creates an exception to the broad reach of the Declaratory Judgment Act that is not supported by the language or purposes of either the Declaratory Judgment Act or CERCLA. Therefore, this Court should grant the petition and reverse.

I. THE NINTH CIRCUIT ACKNOWLEDGED THAT THERE IS A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS CONCERNING THE QUESTION PRESENTED IN THIS PETITION, AND THAT ITS DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

The Ninth Circuit acknowledged that there is a conflict among the federal circuit courts concerning whether a plaintiff can seek declaratory relief under CERCLA for future response costs if the plaintiff has not established its right to recover past costs, and that its decision conflicts with the decisions of other circuit courts. The Ninth Circuit stated:

> Whether a CERCLA plaintiff's failure to establish liability for its past costs necessarily dooms its bid to obtain a declaratory judgment as to liability for its future costs appears to be an issue of first impression in this circuit. Our sister circuits have taken divergent approaches to this issue. Some have held or suggested that recoverable past costs are a sine qua non for declaratory relief under CERCLA. *See, e.g., Trimble v. Asarco, Inc.*, 232 F.3d 946, 858 (8th Cir. 2000), *overruled on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 92 (2d Cir. 2000) (per curiam); *United States v. Occidental Chem. Co.*, 200 F.3d 143, 153-54 (3d Cir. 1999). Others have held or suggested that declaratory relief may be available even in the absence of recoverable

> past costs. *See, e.g., United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001); *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991) (per curiam).

App. 14-15.

As the Ninth Circuit acknowledged in the above passage, its decision conflicts with the Tenth Circuit's decision in *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991). In *Tinney*, the Tenth Circuit stated that a plaintiff can under some circumstances obtain declaratory relief for future response costs under CERCLA even though the plaintiff has not established its claim for past response costs because of its failure to comply with the NCP. The Tenth Circuit stated:

> In holding that consistency with the NCP is an element of a private cost recovery claim, we recognize that there are some circumstances in which a CERCLA plaintiff may be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that all of its claimed response costs were incurred consistent with the NCP. These includes cases . . . in which the factual record does not permit a determination of consistency with the NCP at the time the motion for summary judgment is filed [citations], and those in which the plaintiff seeks only a declaration of the defendant's liability for future costs incurred consistent with the NCP [citations].

933 F.2d at 1513. Elaborating on this point, the court stated:

> Early determination of a defendant's liability for as yet unproven CERCLA-cognizable costs . . . can speed the settlement process and thus promote Congress' goal of encouraging private parties to undertake and fund expedited CERCLA cleanups.

Id. at 1513 n. 9. Thus, while the Tenth Circuit held that declaratory relief claims for future costs *can* be maintained even though past costs are not recoverable, the Ninth Circuit held the opposite – that such declaratory relief claims *cannot* be maintained.

As the Ninth Circuit also acknowledged in the above passage, its decision conflicts with the First Circuit's decision in *United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001). In *Davis*, the First Circuit held that a CERCLA plaintiff was entitled to declaratory relief for future response costs under the Declaratory Judgment Act, as well as CERCLA section 113(g)(2). 261 F.3d at 45-47.[4] While the Ninth Circuit held that the Declaratory Judgment Act was preempted as applied to declaratory relief claims under CERCLA, the First Circuit held that the Declaratory Judgment

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[4] The First Circuit in *Davis* held that declaratory relief claims could be asserted not only for cost recovery claims under CERCLA section 107, which is "the vehicle for an innocent party to recover cleanup costs," but also for contribution claims under CERCLA section 113, which is "the vehicle for a non-innocent party to seek contribution from other polluters." 261 F.3d at 46.

Act authorizes such claims, thus indicating that the Act is not preempted.

Similarly, the District of Columbia district court has held that declaratory relief claims under CERCLA can be asserted for future response costs even though past response costs are not recoverable. *Foster v. United States*, 922 F.Supp. 663, 664 (D. D.C. 1996). The court stated:

> Because a claim for declaratory relief seeks to fix liability for *future* costs, it is nonsensical to require that the plaintiff demonstrate that he has already incurred such costs. While a claim for recovery of past costs is logically antecedent to a claim for future costs, it is not a prerequisite.

922 F.Supp. at 664 (original emphasis).

Thus, as the Ninth Circuit acknowledged, there is a conflict among the federal circuit courts concerning whether CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied in the CERCLA context, and whether CERCLA plaintiffs can assert declaratory relief claims for future costs if they cannot recover past costs, and the Ninth Circuit's decision conflicts with the decisions of the First and Tenth Circuits. This Court should grant the petition in order to resolve the intercircuit conflict.

II. CONTRARY TO THE NINTH CIRCUIT DECISION, CERCLA SECTION 113(g)(2) DOES NOT PREEMPT THE DECLARATORY JUDGMENT ACT AS APPLIED IN THE CERCLA CONTEXT.

A. CERCLA Section 113(g)(2) And The Declaratory Judgment Act Apply Differently In The CERCLA Context And Can Be Construed Harmoniously, And Therefore Section 113(g)(2) Does Not Preempt The Declaratory Judgment Act.

As noted above, the Ninth Circuit held that CERCLA section 113(g)(2) preempts the Declaratory Judgment Act as applied here because "'a precisely drawn, detailed statute pre-empts more general remedies.'" App. 16, quoting from *Hinck v. United States*, 550 U.S. 501, 506 (2007). The Ninth Circuit cited nothing in the language of section 113(g)(2) indicating that the provision preempts, or was intended to preempt, the Declaratory Judgment Act.

Although it is true that a precisely-drawn, detailed statute preempts more general remedies, as the Ninth Circuit held, this principle applies only where the two statutes apply to the same subject and cannot be construed congruently. Here, CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently in the CERCLA context and can be construed harmoniously.

Section 113(g)(2) provides that a declaratory judgment is mandatory – *i.e.*, that the court "shall"

grant declaratory relief, 42 U.S.C. § 9613(g)(2) – on the issue of liability, if the plaintiff has established the defendant's liability for the plaintiff's past response costs. *United States v. USX Corp.*, 68 F.3d 811, 819 (3d Cir. 1995); *Kelley v. E. I. DuPont De Nemours & Co.*, 17 F.3d 886, 844 (6th Cir. 1994). The purpose of the mandatory declaration is to ensure that a plaintiff who has prevailed on its past cost recovery claim will not be required to re-litigate the defendant's liability when the plaintiff seeks recovery of its future response costs in subsequent litigation. As the Third Circuit and Sixth Circuit have explained, in describing section 113(g)(2):

> In providing for the recovery of response costs, Congress included language to ensure that a responsible party's liability, once established, would not have to be re-litigated. . . . The entry of [a] declaratory judgment as to liability is mandatory.

USX Corp., 68 F.3d at 819; *Kelley*, 17 F.3d at 844. Thus, if a plaintiff has established the defendant's liability for *past* response costs, section 113(g)(2) mandates the court to grant declaratory relief for *future* response costs, so that the defendant's liability will not have to be "re-litigated" when the plaintiff seeks future cost recovery.

Since the mandatory declaration provided in section 113(g)(2) applies where the plaintiff has previously established the defendant's liability, the provision does *not* apply where, as here, the plaintiff has *not* previously established the defendant's liability. If the

defendant's liability has not been previously established, there is no basis for precluding re-litigation of the liability issue and thus no basis for a mandatory declaration. Section 113(g)(2) simply has no application or meaning where the plaintiff has not established its past cost recovery claim.

Since section 113(g)(2) does not apply where the defendant's liability has not been previously established, section 113(g)(2) cannot properly be interpreted as preempting the Declaratory Judgment Act as applied in such situations. If the plaintiff's declaratory relief claim meets the "actual controversy" requirements of the Declaratory Judgment Act in such situations, the plaintiff has the right to pursue its declaratory relief claim under the Declaratory Judgment Act, even though the plaintiff has not established its right to recover past costs. Cf. *Reichhold, Inc. v. United States Metals Refining Co.*, 522 F.Supp.2d 724, 728 (D. N.J. 2007) (holding that since plaintiff cannot seek declaratory judgment under CERCLA section 113(g)(2) for contribution costs, plaintiff has right to seek declaratory judgment for contribution costs under Declaratory Judgment Act). Here, the Ninth Circuit held that Colton's declaratory relief claim met all the justiciability requirements of the Declaratory Judgment Act. Thus, Colton should have been allowed to pursue its declaratory relief claim under the Act.

The declaratory relief provision of section 113(g)(2) is included in a provision establishing the limitation period for bringing an action to recover

response costs; under the provision, a cost recovery action must be brought within six years after "initiation" of a remedial action. 42 U.S.C. § 9613(g)(2); App. 50. Since the limitations period is triggered by the initiation of the remedial action rather than its completion, Congress was evidently concerned that a plaintiff may be required to bring its cost recovery action before its remedial action is completed, and resolved the problem by allowing plaintiffs to obtain a mandatory declaratory judgment of liability that would allow future cost recovery once the future costs were incurred. *See State of California v. Neville Chemical Co.*, 358 F.3d 661, 668 n. 4 (9th Cir. 2004). By allowing plaintiffs to obtain mandatory declaratory judgments of liability where their past costs were NCP-compliant, Congress did not thereby preclude plaintiffs from obtaining declaratory judgments under the Declaratory Judgment Act in situations where their past costs were not NCP-compliant, assuming that their claims otherwise meet the justiciability requirements of the Declaratory Judgment Act.

It is thus clear that CERCLA section 113(g)(2) and the Declaratory Judgment Act apply differently and address different subjects in the CERCLA context. Section 113(g)(2) mandates a declaratory judgment where the plaintiff has established its right to recover past costs, and the Declaratory Judgment Act authorizes a declaratory judgment where the plaintiff has not met this burden but is able to meet the "actual controversy" requirements of the Declaratory Judgment Act. Contrary to the Ninth Circuit decision,

section 113(g)(2) does not provide a "detailed" remedy that "pre-empts" the "general" remedy of the Declaratory Judgment Act, but instead addresses an entirely different situation in the CERCLA context.

Stated differently, CERCLA section 113(g)(2) *expands* the rights of plaintiffs to obtain declaratory relief, by mandating such relief for plaintiffs who establish the defendant's liability, but does not *reduce* the rights of plaintiffs to obtain declaratory relief under the Declaratory Judgment Act, by denying such relief for plaintiffs who do not establish the defendant's liability but meet the requirements of the Declaratory Judgment Act. Section 113(g)(2) creates greater rights for declaratory relief claimants but does not preempt their existing rights.

The Ninth Circuit's decision, in holding that CERCLA preempts the Declaratory Judgment Act, violates the well-established rule of statutory construction that repeals by implication are not favored, and that statutes should be construed harmoniously, to the extent possible, so that effect is given to each statute. As this Court has stated:

> [T]he cardinal rule is that repeals by implication are not favored. . . . In the absence of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. . . . When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each

> as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest.

Morton v. Mancari, 417 U.S. 535, 549 (1974) (citations and quotation marks omitted). *See also Branch v. Smith,* 538 U.S. 254, 273 (2003) (plurality opinion); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n,* 393 U.S. 186, 194 (1968); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

Here, the two statutes – the Declaratory Judgment Act and CERCLA section 113(g)(2) – can be read harmoniously so that effect is given to each, because the CERCLA provision provides for mandatory declaratory judgments in certain situations and the Declaratory Judgment Act provides for declaratory judgments in different situations. Nothing in the language of CERCLA section 113(g)(2) suggests that it preempts the Declaratory Judgment Act as applied in the CERCLA context, and Congress provided no indication of any preemptive intent in enacting section 113(g)(2). Under traditional rules of statutory construction, section 113(g)(2) cannot properly be construed as preempting the Declaratory Judgment Act, contrary to the Ninth Circuit decision.

B. There Are Various Legitimate Reasons Why A Plaintiff May Need To Pursue Declaratory Relief Under The Declaratory Judgment Act For Future Response Costs Under CERCLA, Even Though The Plaintiff Does Not Have The Right To Recover Past Costs.

As the Tenth Circuit explained in *County Line Investment Co. v. Tinney*, 933 F.2d 1508 (10th Cir. 1991), there are various reasons why a plaintiff may need to obtain a declaratory judgment under the Declaratory Judgment Act for recovery of future response costs under CERCLA, "even though the plaintiff has not yet established that all of its claimed response costs were incurred consistent with the NCP." *Tinney*, 933 F.2d at 1513. For example, the "factual record" may "not permit a determination of consistency with the NCP at the time the motion for summary judgment is filed." *Id.* Also, the plaintiff – without having incurred any past costs – may "seek[ ] only a declaration of the defendant's liability for future costs incurred consistent with the NCP." *Id.*

As *Tinney* recognized, a CERCLA plaintiff may need to seek a declaration of the defendants' liability for future costs even though the plaintiff has not incurred NCP-compliant past costs. For example, the plaintiff may need to determine the defendants' potential liability before undertaking a future response action, in order to determine whether the response action should be undertaken. The declaratory relief action may determine various aspects of the

defendants' liability, such as whether the defendants caused the contamination, whether they are "covered persons" within the meaning of CERCLA, 42 U.S.C. § 9607(a), whether the defendants have available defenses under CERCLA,[5] whether the statute of limitations bars the cost recovery action, and other such matters. The determination of these issues may guide the plaintiff in deciding whether to commence a response action.

The instant case presents an example of precisely why a plaintiff may need to secure a declaratory judgment for future response costs even though the plaintiff has not established its right to recover past costs. If Colton is unable to obtain a declaratory judgment for future cost recovery because it cannot recover past costs, Colton may be unable to recover its future costs from all defendants potentially responsible for the contamination of Colton's drinking water supplies. As the Ninth Circuit stated, "Colton faces a potential statute of limitations bar with respect to its claims against certain defendants. . . ." App. 12. More specifically, some defendants argue that Colton cannot initiate a new cost recovery action against them because any such action is time-barred.[6]

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[5] Under CERCLA, defendants are not liable for response costs if the contamination was caused by an act of God, an act of war, or the acts or omissions of third parties. 42 U.S.C. § 9607(b).

[6] The basis of the defendants' argument that a new action would be time-barred is explained more fully in Colton's reply brief in the Court of Appeals, at pages 27-28, and note 8. The

(Continued on following page)

If their argument is correct, Colton's only basis for recovering its future response costs from them is by assertion of its declaratory relief claim in this case. The Ninth Circuit, by precluding Colton from asserting this claim, may preclude Colton from obtaining future cost recovery from these defendants, even though they are allegedly responsible for the contamination of Colton's drinking water supplies.

Conversely, a CERCLA plaintiff would always prefer to obtain a declaratory judgment under CERCLA section 113(g)(2) rather than under the Declaratory Judgment Act, if the remedy is available to the plaintiff, because a declaratory judgment under section 113(g)(2) affords a stronger remedy than under the Declaratory Judgment Act. Section 113(g)(2) provides that "the court *shall* enter a declaratory judgment on *liability* for response costs or damages that will be *binding* on any subsequent action or actions." 42 U.S.C. § 9613(g)(2) (emphasis added). Since the mandatory declaratory judgment establishes "liability" that is "binding" in the subsequent action, the defendant must raise all available defenses in the initial action or lose them in the subsequent action. By contrast, a declaratory judgment under the Declaratory Judgment Act is collateral estoppel in the subsequent action only on issues that are "actually litigated and determined" by a valid judgment. *Bobby*

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relevant portions of the reply brief are included in the Appendix, at pages 54-55.

v. Bies, ___ U.S. ___, 129 S.Ct. 2145, 2152 (2009); *Arizona v. California*, 530 U.S. 392, 414 (2000). Therefore, the defendant in such an action is free to raise and litigate issues in the subsequent action that it did not raise in the initial action. Nonetheless, although the mandatory declaration provided in section 113(g)(2) provides a stronger remedy for the plaintiff, the plaintiff should have the right to pursue the lesser remedy provided in the Declaratory Judgment Act, if the stronger remedy of section 113(g)(2) is not available.

It is thus clear that CERCLA section 113(g)(2) and the Declaratory Judgment Act establish different sets of rights and obligations concerning the plaintiff's ability to seek declaratory relief in the CERCLA context. Section 113(g)(2) allows the plaintiff to obtain a mandatory declaratory judgment of liability that is binding in the subsequent action, and the Declaratory Judgment Act allows a plaintiff who cannot qualify for declaratory relief under section 113(g)(2) to nonetheless obtain a declaratory judgment that will have a collateral estoppel effect on the actually-adjudicated issues. Contrary to the Ninth Circuit's view, the statutes do not impose conflicting requirements applicable to the same situation, but instead provide complementary remedies in different situations. Thus, there is no basis for the Ninth Circuit's conclusion that the CERCLA provision preempts the Declaratory Judgment Act.

The Ninth Circuit decision categorically precludes all such plaintiffs in the foregoing situations

from obtaining declaratory relief for future cost recovery under the Declaratory Judgment Act, no matter how compelling the evidence in support of such relief, and even though the claims concededly meet the "actual controversy" requirements of the Declaratory Judgment Act. Under the Ninth Circuit decision, all that matters is that the plaintiff cannot recover its past costs. In fact, there is no inherent nexus between the right to recover past costs and the right to recover future costs in terms of NCP compliance; a plaintiff who has failed to comply with the NCP in its past response action may fully comply with the NCP in its future response action. *See United States v. USX Corp.*, 68 F.3d 811, 819 n. 17 (3d Cir. 1995). If the plaintiffs in these situations fully comply with the NCP in their future response actions and are able to meet the stringent "actual controversy" requirements of the Declaratory Judgment Act – which requires the existence of an immediate and actual controversy, and not a hypothetical or abstract one, *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) – the plaintiffs should be allowed to assert their declaratory relief claims under the Declaratory Judgment Act, even though they cannot recover past response costs.

Nothing in the Declaratory Judgment Act suggests that declaratory relief claims for future cost recovery under CERCLA cannot be maintained before the work is actually performed and the costs actually incurred, assuming that the Act's "actual controversy"

requirements are met. On the contrary, the Act specifically authorizes parties to obtain judicial declarations of their rights, "whether or not further relief is or could be sought." 28 U.S.C. § 2201. Similarly, nothing in CERCLA section 113(g)(2) suggests that it preempts, or was intended to preempt, the Declaratory Judgment Act as applied to such declaratory relief claims. Therefore, under traditional rules of statutory construction, the proper conclusion is that CERCLA section 133(g)(2) does not preempt the Declaratory Judgment Act as applied in the CERCLA context, and the Ninth Circuit erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF COLTON, a California municipal corporation,

Plaintiff-Appellant,

v.

AMERICAN PROMOTIONAL EVENTS, INC.-WEST; APOLLO MANUFACTURING CO.; ASTRO PYROTECHNICS, INC.; ATLAS FIREWORKS COMPANY, INC.; BLACK & DECKER, INC.; CALIFORNIA FIREWORKS DISPLAY COMPANY; COUNTY OF SAN BERNARDINO; EMHART INDUSTRIES, INC.; GOODRICH CORPORATION; KWIKSET LOCKS, INC.; PYRO SPECTACULARS, INC.; PYROTRONICS CORP.; RED DEVIL FIREWORKS COMPANY; THOMAS O. PETERS; THE 1966 THOMAS O. PETERS AND KATHLEEN S. PETERS REVOCABLE TRUST; TROJAN FIREWORKS, CO.; UNITED FIREWORKS MANUFACTURING COMPANY INC.; WHITTAKER CORPORATION,

Defendants-Appellees.

No. 06-56718

D.C. No.
CV-05-01479-JFW

OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
January 11, 2010 – Pasadena, California
Filed August 2, 2010

Before: Alfred T. Goodwin, William C. Canby, Jr., and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Roderick E. Walston, Best Best & Krieger LLP, Walnut Creek, California, argued the cause and filed briefs for plaintiff-appellant. With him on the briefs were Gene Tanaka, Cynthia Germano, and Danielle G. Sakai, Best Best & Krieger LLP, Walnut Creek, California.

James L. Meeder, Allen Matkins Leck Gamble Mallory & Natsis LLP, San Francisco, California, argued the cause and filed a brief for defendants-appellees American Promotional Events, Inc.-West, Astro Pyrotechnics, Inc., Black & Decker, Inc., County of San Bernardino, Emhart Industries, Inc., Kwikset Locks, Inc., Thomas O. Peters, The 1996 Thomas O. Peters and Kathleen S. Peters Revocable Trust, Trojan Fireworks, and Whittaker Corp. With him on the brief were Ruth E. Stringer, Maxine M. Morisaki, Robert L. Jocks, Office of the County Counsel, County of San Bernardino, San Bernardino, California; Timothy V.P. Gallagher, Martin N. Refkin, Thomas A.

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Jeffrey D. Dintzer, Gibson, Dunn & Crutcher LLP, Los Angeles, California, filed a brief on behalf of defendant-appellee Goodrich Corporation. With him on the brief were Denise G. Fellers, Gibson, Dunn & Crutcher LLP, Los Angeles, California, and Michael K. Murphy, Gibson, Dunn & Crutcher LLP, Washington, D.C.

Philip C. Hunsucker, Resolution Law Group, P.C., Lafayette, California, filed a brief on behalf of defendant-appellant Pyro Spectaculars, Inc. With him on the brief were Brian L. Zagon and Allison E. McAdam, Resolution Law Group, P.C., Lafayette, California.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide, among other things, whether the City of Colton, California, can recover response costs under the Comprehensive Environmental Response, Compensation, and Liability Act allegedly incurred as a result of perchlorate contamination in its water supply.

I

A

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") "is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). Under CERCLA section 107(a), 42 U.S.C. § 9607(a), a private party may "recover expenses associated with cleaning up contaminated sites." *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007).

To establish a prima facie claim for recovery of response costs under section 107(a), a private-party plaintiff must demonstrate:

> (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, Section 101(9), 42 U.S.C. § 9601(9); (2) a "release" or

> "threatened release" of any "hazardous substance" from the facility has occurred, 42 U.S.C. § 9607(a)(4); (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. §§ 9607(a)(4) and (a)(4)(B); and (4) the defendant is within one of four classes of persons subject to the liability provisions of Section 107(a).

Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 870-71 (9th Cir. 2001) (en banc) ("*Carson Harbor I*") (internal quotation marks omitted). Only the third element – whether the response costs were necessary and consistent with the national contingency plan ("NCP") – is at issue in this appeal.

Response costs are considered necessary when "an actual and real threat to human health or the environment exist[s]." *Id.* at 871. Response costs are considered consistent with the NCP "if the action, when evaluated as a whole, is in substantial compliance" with it. 40 C.F.R. § 300.700(c)(3)(i). The NCP "specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency (EPA) pursuant to CERCLA § 105." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 n.2 (2004); *see also* 40 C.F.R. Pt. 300 (codifying the NCP). "It is designed to make the party seeking response costs choose a cost-effective course of action to protect public health and the environment." *Carson Harbor Village Ltd. v. County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir.

2006) ("*Carson Harbor II*") (internal quotation marks omitted).

B

The City of Colton ("Colton") draws its water supply from the Rialto-Colton groundwater basin ("Basin") in San Bernardino County, California. In 1997, Colton began monitoring its municipal supply wells for perchlorate contamination. By 2002, Colton had detected perchlorate in three of its wells in concentrations ranging from about 4 to 10 micrograms per liter ("μg/L"). At the time, the California Department of Health Services ("CDHS"), which regulates water quality, had an "advisory action level" for perchlorate of 4 μg/L. CDHS informed Colton that because "the perchlorate action level is an advisory action level, and thus, not enforceable," the three impacted wells "may continue to be used to supply the system." Nevertheless, in a closed-session meeting between its City Council and City Attorney, Colton adopted a policy of prohibiting the use of water with perchlorate levels above 4 μg/L. Pursuant to this policy, Colton took the impacted wells out of service and instituted a wellhead treatment program to eliminate the perchlorate in 2003.

C

In 2005, Colton filed suit against numerous entities that had engaged in industrial activities in the Basin over the years, alleging that they caused

the release of perchlorate into the groundwater. In its third amended complaint, filed in December 2005, Colton alleged that it had spent $4 million to investigate the contamination and to implement the wellhead treatment program. Colton asserted claims for cost recovery and contribution under CERCLA, 42 U.S.C. §§ 9607(a), 9613(f); a claim for declaratory relief as to liability for future costs under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; and various claims under state law.

Numerous defendants filed a motion for summary judgment, arguing that Colton could not recover its wellhead treatment program costs under CERCLA.[1] In its opposition, Colton argued that the defendants were liable for not only its wellhead treatment program costs, but also costs associated with a future Basin-wide cleanup estimated to cost between $55 and $75 million. The district court granted summary judgment for the defendants on Colton's federal claims and declined to exercise supplemental jurisdiction over Colton's state law claims.[2] The district court

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[1] The defendant entities which joined in the motion were the County of San Bernardino, the 1996 Thomas O. Peters and Kathleen S. Peters Revocable Trust, Thomas O. Peters, American Promotional Events, Inc.-West, Pyro Spectaculars, Inc., Astro Pyrotechnics, Inc., Emhart Industries, Inc., Kwikset Locks, Inc., Black & Decker, Inc., Whittaker Corp., and Trojan Fireworks Co.

[2] Although not all the defendants joined in the motion for summary judgment, the district court *sua sponte* granted summary judgment in favor of the non-moving defendants.

held that Colton could not recover its costs associated with the wellhead treatment program because it failed to show that such costs were necessary and consistent with the NCP; furthermore, because Colton could not show that it was entitled to recover any of its past costs, its claim for declaratory relief as to its future costs necessarily failed. Colton timely appealed.[3]

II

Colton first seeks reversal of the district court's summary judgment denying recovery of its past response costs. Colton challenges the district court's conclusion that the wellhead treatment program was unnecessary because there was no immediate threat to the public health or environment. *See* 42 U.S.C. § 9607(a)(4)(B). Colton concedes, however, that it failed to comply with the national contingency plan in its past response action. Because Colton's concession is a sufficient ground upon which to affirm the summary judgment with respect to past response costs, we decline to review the merits of the district court's conclusion that such costs were unnecessary. *See*

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[3] The district court also dismissed all counterclaims and cross-claims. Both Goodrich and Pyro Spectaculars, Inc. cross-appealed from the district court's dismissal of these counterclaims and cross-claims. We address the cross-appeals in a memorandum disposition filed concurrently with this opinion.

Dorsey v. Nat'l Enquirer, Inc., 973 F.2d 1431, 1438 (9th Cir. 1992).[4]

III

Colton also contends that the district court erred in granting summary judgment denying its claim for declaratory relief as to its future response costs.

A

Before addressing the merits of the claim, we turn to the parties' various jurisdictional arguments.

1

The parties dispute whether Colton's claim for declaratory relief is ripe. "The constitutional ripeness of a declaratory judgment action depends upon

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[4] Colton contends that if the district court's holding on the necessity of the response action is allowed to stand, such holding could have a preclusive effect in subsequent litigation. We note, however, that in a future action, Colton could argue that our reliance on the NCP compliance holding alone vitiates any preclusive effect of the district court's necessity holding. *See, e.g., Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996) ("It is a well-established principle of federal law that if an appellate court considers only one of a lower court's alternative bases for its holding, affirming the judgment without reaching the alternative bases, only the basis that is actually considered can have any preclusive effect in subsequent litigation."); *see also* Restatement (Second) of Judgments § 27, cmt. o (1982).

whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) (internal quotation marks omitted).

In *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887 (9th Cir. 1986), we held that a claim for declaratory relief as to CERCLA liability is ripe when the "essential fact establishing [the plaintiff's] right to declaratory relief – the alleged disposal of hazardous substances . . . – has already occurred." *Id.* at 893. Later, in *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991), we held that a claim for cost recovery and declaratory relief under CERCLA becomes ripe only after plaintiffs "spend some money responding to an environmental hazard." *Id.* at 249. Finally, in *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177 (9th Cir. 2000), we held that a claim for declaratory relief for contribution under CERCLA section 113 is ripe when "[t]he pollution has been carefully studied, the parties litigated a genuine controversy about millions of dollars they had already spent, and the facts bringing about their relative responsibility have already occurred." *Id.* at 1192.

None of these cases imposed any requirement that a party incur *recoverable* – *i.e.*, necessary and NCP-compliant – response costs before its claim for declaratory relief is ripe. Indeed, our cases make clear that so long as there has been a release of

hazardous substances, and the plaintiff spends some money responding to it, a claim for declaratory relief is ripe for review. *Accord Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 668 n.4 (9th Cir. 2004) (explaining in dicta that "[a]s soon as [the plaintiff] expended its first dollar, it could have sued [the defendant] for this dollar and sought a declaratory judgment of [defendant's] liability for future response costs").

Here, the facts establishing Colton's right to declaratory relief have already occurred because there is no dispute that there is perchlorate contamination of the Basin. Moreover, there is no dispute that Colton has incurred costs in responding to the contamination, and that Colton will incur additional costs in the future. The only dispute is whether Colton is entitled to recover these costs, which goes to the merits, not justiciability. Because this controversy cannot be deemed "remote and hypothetical," *Wickland Oil,* 792 F.2d at 893, we conclude that Colton's claim for declaratory relief is ripe.

2

We next turn to the argument that Colton has mooted this appeal by filing a substantially new action in the same district court.[5] "A case is moot on

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[5] The second action filed by Colton, No. 06-01319, was eventually dismissed without prejudice. Colton then filed a third

(Continued on following page)

appeal if no live controversy remains at the time the court of appeals hears the case." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007). The test for mootness is "whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor." *Id.* (internal quotation marks omitted).

The defendants argue that Colton has effectively redressed the injury it seeks to remedy with this appeal – namely, the district court's dismissal of its declaratory relief claim – by filing a new action seeking the same relief. Therefore, our reinstatement of such claim would be superfluous. However, "[t]here is a recognized defense to a claim of mootness in the appellate context when a party can demonstrate that a lower court's decision, if allowed to stand, may have collateral consequences adverse to its interests." *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008). Here, Colton faces a potential statute of limitations bar with respect to its claims against certain defendants, an argument these defendants have pressed in the later-filed action. A reversal by this court could put Colton on better footing with regard to limitations defenses, which "is a collateral consequence of the type that suffices to defuse a claim of

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action, No. 09-01864, which is currently pending in the district court. It is this third action to which we refer.

mootness." *Id.* at 89. We therefore conclude that this appeal is not moot.

3

Finally, we consider whether the district court's disposal of Colton's CERCLA past response cost-recovery claims deprived the court of subject matter jurisdiction over the declaratory relief claim.[6]

"It is well settled that the Declaratory Judgment Act does not itself confer federal subject matter jurisdiction but merely provides an additional remedy in cases where jurisdiction is otherwise established." *Staacke v. U.S. Sec'y of Labor,* 841 F.2d 278, 280 (9th Cir. 1988) (internal quotation marks and citation omitted). "Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits." *Cement Masons Health & Welfare Trust Fund for N. Cal. v. Stone,* 197 F.3d 1003, 1008 (9th Cir. 1999).

Here, Colton's declaratory relief claim is predicated on CERCLA, a federal statute providing a private right of action. Colton's nonfrivolous assertion of a CERCLA declaratory relief claim is therefore

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[6] We reject the argument that Colton is judicially estopped from arguing that there is subject matter jurisdiction. It is well established that subject matter jurisdiction cannot be expanded or contracted "by prior action or consent of the parties." *Am. Fire & Cas. Co. v. Finn,* 341 U.S. 6, 17-18 (1951).

sufficient to confer federal subject matter jurisdiction, regardless of the district court's conclusion that Colton's CERCLA past response cost-recovery claims lacked merit.

B

Turning to the merits, we note that the district court held that because it was granting summary judgment on the section 107 cost-recovery claims, "Defendants are entitled to summary judgment in their favor on Plaintiff's . . . claim for [declaratory] relief as well." Colton argues that its failure to incur recoverable response costs in the past has no bearing on whether it will incur such costs in the future.[7] Therefore, Colton contends that it should still be allowed to seek declaratory relief as to liability for its future costs.

Whether a CERCLA plaintiff's failure to establish liability for its past costs necessarily dooms its bid to obtain a declaratory judgment as to liability for its future costs appears to be an issue of first

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[7] Contrary to the defendants' assertion, Colton did not waive this argument by failing to raise it below. In opposition to summary judgment, Colton argued that "it was not required to complete all tasks required by the NCP prior to the filing of the complaint," and that "so long as [it] has incurred at least nominal response costs," it could "invoke the declaratory relief provision of CERCLA to recover its future costs," even if "it is still too early to know how Colton will comply with the NCP." This is the same argument it now makes on appeal.

impression in this circuit. Our sister circuits have taken divergent approaches to this issue. Some have held or suggested that recoverable past costs are a sine qua non for declaratory relief under CERCLA. *See, e.g., Trimble v. Asarco, Inc.*, 232 F.3d 946, 958 (8th Cir. 2000), *overruled on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 92 (2d Cir. 2000) (per curiam); *United States v. Occidental Chem. Co.*, 200 F.3d 143, 153-54 (3d Cir. 1999). Others have held or suggested that declaratory relief may be available even in the absence of recoverable past costs. *See, e.g., United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001); *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991) (per curiam).

1

The text of the Declaratory Judgment Act provides, in relevant part, that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). CERCLA also contains a provision for declaratory relief. Section 113(g)(2) provides that in any initial cost-recovery action under section 107, "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or

actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2).

Although Colton's complaint referred to the Declaratory Judgment Act rather than CERCLA section 113(g)(2), the latter provision clearly governs this initial cost-recovery action. Because "a precisely drawn, detailed statute pre-empts more general remedies," *Hinck v. United States,* 550 U.S. 501, 506 (2007) (internal quotation marks omitted), we must consider whether Colton was entitled to declaratory relief under CERCLA's more detailed declaratory relief provision. *See A. Shapiro & Sons, Inc. v. Rutland Waste & Metal Co.,* 76 F. Supp. 2d 82, 88 (D. Mass. 1999) (declining "to permit an indirect approach to declaratory relief [under the Declaratory Judgment Act] when the direct CERCLA-based approach . . . is unavailable").

The declaratory judgment mandated by section 113(g)(2) pertains to "liability for response costs." 42 U.S.C. § 9613(g)(2). Such "liability for response costs" must refer to the response costs sought in the initial cost-recovery action, given that the sentence later refers to "any *subsequent* action or actions to recover *further* response costs." *Id.* (emphases added). Therefore, if a plaintiff successfully establishes liability for the response costs sought in the initial cost-recovery action, it is entitled to a declaratory judgment on present liability that will be binding on future cost-recovery actions.

Here, Colton has failed to establish present liability because of its conceded failure to comply with the NCP but seeks a declaratory judgment on *future* liability. Section 113(g)(2), however, does not provide for such relief. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transam. Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19-20 (1979). In section 113(g)(2), Congress specified a mechanism whereby a declaration of liability for costs already incurred has preclusive effect in future proceedings as to costs yet to be incurred. If Congress had intended for a declaration of future liability to be available, it could have provided that "the court shall enter a declaratory judgment on liability for *further* response costs." That it did not leads us to conclude that declaratory relief is available only if liability for past costs has been established under section 107.

2

Colton would have us bypass the initial liability determination to further "CERCLA's goal of encouraging private parties to clean up hazardous sites." According to Colton, denying declaratory relief "would discourage private parties from taking future actions to clean up hazardous sites if they failed to comply with the NCP in taking past cleanup actions." CERCLA's goal, however, is not simply to encourage private response, but rather to "make the party seeking response costs choose a cost-effective course

of action to protect public health and the environment" and to achieve "a CERCLA-quality cleanup." *Carson Harbor II*, 433 F.3d at 1265 (internal quotation marks omitted). Providing declaratory relief based on mere assurances of future compliance with the NCP would create little incentive for parties to ensure that their initial cleanup efforts are on the right track. *See Dant & Russell*, 951 F.2d at 250 (noting that premature relief under CERCLA can create perverse incentives).

Moreover, awarding declaratory relief before a plaintiff has incurred any recoverable costs would undermine the very purpose of declaratory relief, which is to "economize[ ] on judicial time." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998). A court would have to make complicated determinations as to which defendants are responsible for what proportion of the release, without any assurance that the plaintiff would ever "meet its burden of proving in an adversary proceeding that its expenses were necessary and incurred in a manner consistent with the national contingency plan." *Stanton Road Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021 (9th Cir. 1993).

We conclude that CERCLA's purposes would be better served by encouraging a plaintiff to come to court only after demonstrating its commitment to comply with the NCP and undertake a CERCLA-quality cleanup. Upon establishing liability under section 107, the plaintiff can "obtain reimbursement for [its] initial outlays, as well as a declaration that the responsible party will have continuing liability for

the cost of finishing the job." *Dant & Russell,* 951 F.2d at 249-50. Such a declaration would allow the plaintiff to avoid costly and time-consuming relitigation of liability once it has already been established. *See Kelley v. E.I. DuPont de Nemours & Co.,* 17 F.3d 836, 844 (6th Cir. 1994) ("Congress included language [in section 113(g)(2)] to insure that a responsible party's liability, once established, would not have to be relitigated. . . . "). Where, as here, the plaintiff fails to establish section 107 liability in its initial cost-recovery action, no declaratory relief is available as a matter of law.

IV

Colton also appeals from the dismissal of its pendent state law claims. Having disposed of Colton's federal claims, the district court declined to exercise supplemental jurisdiction over the state law claims. *See* 28 U.S.C. § 1367(c)(3). "Because the district court did not err in granting summary judgment on the federal claims, it did not abuse its discretion in dismissing the state-law claims." *Bryant v. Adventist Health Sys./W.,* 289 F.3d 1162, 1169 (9th Cir. 2002).

V

For the foregoing reasons, the district court's summary judgment is **AFFIRMED**.[8]

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[8] We grant the outstanding motions for judicial notice.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. **CV 05-1479-JFW (SSx)** Date: October 31, 2006

Title: CITY OF COLTON -v- AMERICAN PRO MOTIONAL EVENTS, INC. – WEST, et al.

PRESENT:

HONORABLE JOHN F. WALTER,
UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**
ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	**None**
PROCEEDINGS (IN CHAMBERS):	**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT [filed 8/14/06; Docket No. 461]**

On August 14, 2006, Defendants County of San Bernardino, 1996 Thomas O Peters and Kathleen S. Peters Revocable Trust, Thomas O. Peters, American Promotional Events, Inc. – West, Pyro Spectaculars, Inc., Astro Pyrotechnics, Inc., Emhart Industries, Inc., Kwikset Locks, Inc., Black & Decker, Inc., Whittaker Corporation, and Trojan Fireworks

("Defendants") filed a Motion for Summary Judgment, or in the alternative, for Partial Summary Judgment ("Motion"). On September 6, 2006, Plaintiff City of Colton ("Plaintiff") filed its Opposition. On September 25, 2006, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's October 2, 2006 hearing calendar and the parties were given advance telephonic notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. FACTUAL SUMMARY

This action was originally filed on February 28, 2005. On December 13, 2005, Plaintiff filed its Third Amended Complaint ("TAC") alleging claims for relief for (1) Recovery of Response Costs Pursuant to CERCLA (42 U.S.C. § 9607(a)); (2) Contribution Pursuant to CERCLA (42 U.S.C. § 9607(a)); (3) Recovery of Response costs Pursuant to Carpenter-Presley-Tanner Hazardous Substances Account Act (Cal. Health & Safety Code §§ 25300-25395.45); (4) Recovery of Response Costs Pursuant to Porter-Cologne Water Quality Control Act (Cal. Water Code §§ 1300-13365); (5) Nuisance; (6) Public Nuisance; (7) Trespass; (8) Declaratory Relief Pursuant to the Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202); and (9)

Declaratory Relief under State Law (Cal. Civ. Proc. Code § 12060).

Defendants move for summary judgment on Plaintiff's CERCLA claims on the grounds that the response costs allegedly incurred in connection with the remediation of three wells (Well Nos. 15, 17 and 24) in which perchlorate was detected (the "Impacted Wells") were not necessary and consistent with the National Contingency Plan ("NCP"). Defendants argue that Plaintiff cannot recover its response costs and Defendants are entitled to judgment in their favor on Plaintiff's CERCLA claims.[1] Plaintiff contends that Defendants are not entitled to summary judgment because the response costs it has already incurred in connection with the treatment of the Impacted Wells were incurred as part of a removal action which satisfied the requirements of the NCP and because Plaintiff has begun the NCP compliance process required for remedial actions with respect to the Rialto-Colton basin-wide clean-up ("Basin-wide Cleanup").

The undisputed material facts establish the following: In 1997, Plaintiff began monitoring the Impacted Wells for perchlorate. Declaration of Daniel

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[1] Defendants argue, alternatively, that even if the Court finds that they are not entitled to judgment on Plaintiff's CERCLA claims, the Court should find that they are entitled to partial summary judgment barring Plaintiff from recovering its past or future response costs in connection with the treatment of the Impacted Wells.

S. Kippen in Support of Defendants' Motion ("Kippen Decl."), Exhibit ("Exh.") Exh. 5A at 6996. In the Fall of 1997 and 2001, perchlorate levels above the detection limit of 4 µg/L[2] were detected in two of the Impacted Wells (Well Nos. 15 and 24). *Id.* In February 2002, Plaintiff took one of the Impacted Wells (Well No. 24) out of service after detecting a perchlorate level of 4.5 µg/L. Kippen Decl., Exh. 5 at 254:14-19; Exh. 5A at 6995-6996. In March, 2002, perchlorate levels of 5.7 µg/L and 9.2-9.5 µg/L, respectively, were detected in the remaining two Impacted Wells (Wells Nos. 15 and 17). Kippen Decl., Exh. 5A at 6996. In April 2002, Plaintiff removed from service the remaining two Impacted Wells (Wells Nos. 15 and 17). Kippen Decl. Exh. 5 at 253:17-20; 254; Exh. 5A at 6994-6996. In April 2002, Plaintiff advised the California Department of Health Services ("DHS", the state agency responsible for regulating domestic water quality, that it had removed the Impacted Wells from service. Kippen Decl., Exh. 5 at 6996. Plaintiff removed the Impacted Wells from service even though no DHS requirement compelled it to do so. Kippen Decl., Exh. 5 at 253:17-25; 254:2-23.

On August 12, 2002, apparently in response to Plaintiff's request for more information regarding the use of water that exceeded the DHS "Action Level" for perchlorate, Plaintiff was advised by the DHS that

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[2] µg/L symbolizes microgram per liter. One microgram per liter equals one part per billion.

the perchlorate level in some of Plaintiff's wells exceeded the "current Action Level of 4 µg/L (with a range from 5.7 to 9.5 µp/L for Well Nos. 15, 17 and 24)." Kippen Decl. Exh. 5D. The DHS advised Plaintiff that the "perchlorate action level is an advisory action level, and thus, not enforceable." *Id.* The DHS further advised Plaintiff that "[a]n exceedance of the perchlorate action level in drinking water is not a violation of any standard" and that "a source exceeding the perchlorate action level may continue to be used to supply the system . . . [h]owever any source, which exceeds ten time the action level, should be taken out of service." *Id.*

Although advised by the DHS that the City's drinking water was potable despite the presence of perchlorate, Plaintiff established a policy prohibiting the use of water with detectable levels of perchlorate. Kippen Decl., Exh. 3 at 146:20-147:12. Plaintiff made its decision not to serve water with detectable levels of perchlorate during a closed session meeting between its City Council and City Attorney. Kippen Decl. Exh. 5 at 305:24-306:2. Neither Plaintiff's staff nor its Water Director, Eric Fraser ("Fraser"), alone or in collaboration with any consultants, prepared any written memoranda analyzing Plaintiff's policy to serve only perchlorate-free water or the rationale for such a policy. Kippen Decl. Exh. 5 at 305:16-21, 306:3-8. Plaintiff implemented its decision not to serve water with detectable levels of perchlorate by taking the Impacted Wells out of service until it could install an "ion exchange system" ("Treatment

System") to make the water free from perchlorate. Kippen Decl., Exh. 4 at 34:8-23; Exh. 5 at 260:3-19, 313:7-12.

At its October 25, 2002 meeting, the California Regional Water Quality Control Board ("Regional Board") considered adoption of a resolution requesting an allocation of $3 million from Cleanup and Abatement Account funds ("CAA")[3] from the State Water Resources Control Board ("State Board") to support certain water purveyors, including Plaintiff's, wellhead treatment projects to clean up perchlorate pollution. Evidence in Support of Plaintiff's Opposition ("Plaintiff's Evidence"), Exh. V, Exh. W. The Minutes of the Regional Board meeting reflect that the resolution was adopted without public comment. *Id.* at Ex. X. The Regional Board Resolution requested that the water purveyors seeking CAA funds submit a project plan by November 15, 2002. *Id.* at Exh. Y. On November 14, 2002, Fraser wrote to the Regional Board explaining that Plaintiff was reviewing proposals from three vendors to install the Treatment System to remove perchlorate from Impacted Wells ("Wellhead Treatment Program"). Plaintiff's Evidence, Exh. BB. In the Summer of

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[3] The CAA was created by state statute and is funded by "[m]onies received from court judgments and the assessment of administrative civil liabilities." Plaintiff's Evidence, Exh. W. "Monies from the CAA are available for contract services to clean up a waste or abate the effects of a waste discharge and to remedy an actual or potential unforeseen public health threat." *Id.*

2003, the installation of the Treatment System was completed. Deposition of Eric Fraser, Volume II, April 12, 2006, 295:17-296:21; Exh. 1778.

In January, 2006, Plaintiff hired DPRA, an environmental research and consulting firm, which began working on a Workplan for Installation and Sampling of Goundwater Monitoring Wells Near the City of Colton, County of San Bernardino, California ("Workplan"). Plaintiff's Evidence, Declaration of Gary Vargas ("Vargas Decl.") ¶ 5. According to Gary Vargas ("Vargas"), the DPRA consultant working with Plaintiff, "[t]he Workplan describes [Plaintiff's] plans to investigate perchlorate contamination within the groundwater at two locations near [its] municipal supply wells." *Id.* In the Spring of 2006, DPRA prepared a Community Involvement Plan for Workplan for Installation and Sampling of Groundwater Monitoring Wells Near the City of Colton, County of San Bernardino, California ("Community Involvement Plan"). *Id.* at ¶ 4. The Community Involvement Plan was delivered to Fraser on or about May 4, 2006. *Id.* According to Vargas, "[t]he Community Involvement Plan provides for public involvement in a workplan for groundwater monitoring wells that are part of [Plaintiff's] preliminary remedial investigation of contamination in the Rialto/Colton Groundwater Basin." *Id.*

II. LEGAL STANDARD

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). the moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. DISCUSSION

A. Plaintiff's Response to the Detection of Perchlorate in its Drinking Water Wells Was Not a Removal Action.

1. Plaintiff Did Not Properly Initiate a Removal Action.

Defendants contend that Plaintiff's Wellhead Treatment Program was a remedial action that did not comply with the requirements of the NCP. Plaintiff does not argue that its Wellhead Treatment Program complied with the NCP requirements for a remedial action, rather, Plaintiff argues that its Wellhead Treatment Program was a removal action and Plaintiff complied with the NCP requirements for a removal action. Accordingly, there are no disputed issues of material fact that Plaintiff did not conduct a remedial action or comply with the NCP requirements for a remedial action when it initiated and installed its Wellhead Treatment Program. Therefore, unless Plaintiff can establish that it properly initiated a removal action in compliance with the requirements of the NCP and that Plaintiff's actions in establishing the Wellhead Treatment Program are properly characterized as removal activities, Defendants are entitled to judgment on Plaintiff's CERCLA claims. *See United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1233-1234 (9th Cir. 2005) (setting forth a two-step analysis for determining whether a response action is a removal or remedial action; requiring plaintiff to first show that it properly initiated the removal action and then, that "the steps actually

taken . . . are properly characterized as a removal action.")

"Whether a party's response is a removal action or a remedial action is a question of law that can be decided on summary judgment." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, *1157 (C.D.Cal. 2003). Additionally, "the classification of the activity [whether removal or remedial] is determined as a matter of law." *United States v. W.R. Grace & Co.*, 429 F.3d at 1234.

Although "removal action" is not expressly defined in CERCLA, CERCLA defines the terms "remove" and "removal" as follows:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such action as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for . . .,

> action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

42 U.S.C. § 9601(23).[4]

"Removal actions are typically described as time-sensitive responses to public health threats." *United States v. W.R. Grace & Co.*, 429 F.3d at 1227-1228. By contrast, "[r]emedial actions . . . are often described as permanent remedies to threats for which an urgent response is not warranted. *Id.* at 1228.

The NCP provides that:

> In determining the appropriate extent of action to be taken in response to a given release, the lead agency shall first review the removal site evaluation, any information produced through a remedial site evaluation, if any has been done previously, and the

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[4] In their Reply, Defendants' note that the parties dispute whether perchlorate is a hazardous substance and advise the Court that it may look forward to ruling on a motion on this issue. Reply at 24:8-15. Despite the fact that a determination that perchlorate is not a hazardous substance could be dispositive of the issues presented in this Motion, and perhaps this entire action, in the absence of briefing on this issue, the Court must presume, for purposes of this Motion that perchlorate is a hazardous substance, or at least a pollutant or contaminant, otherwise whether Plaintiff undertook a removal action or a remedial action would likely be irrelevant.

> current site conditions, to determine if removal action is appropriate.

40 C.F.R. § 300.415(a)(1).[5]

The NCP sets forth the requirements for a removal site evaluation. *See* 40 C.F.R. § 300.410.[6] A removal site evaluation should include a removal preliminary assessment and, if warranted, a removal site inspection. *See* 40 C.F.R. § 300.410(a). It should be undertaken by the lead agency as promptly as possible. *See* 40 C.F.R. § 300.410(b). The removal preliminary assessment may be based on readily available information, and may include, but is not limited to:

> (i) identification of the source and nature of the release or threat of release;

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[5] 40 C.F.R. § 300.700 sets forth the mechanisms available for private parties to recover the costs of response actions under CERCLA, including section 107(a) cost recovery actions. The provisions of 40 C.F.R. § 300.415 (except for certain paragraphs) are applicable to section 107(a) recovery actions by private parties. *See* 40 C.F.R. § 300.700(c)(5)(vi). Although the term "lead agency" is defined in CERCLA, and generally denotes a government agency, the term is used here generally to refer to Plaintiff – the lead actor in the response action – and to maintain the integrity of statutory quotations.

[6] The provisions of 40 C.F.R. § 300.410 (except for certain paragraphs) are applicable to section 107(a) recovery actions by private parties. *See* 40 C.F.R. § 300.700(c)(5)(v).

> (ii) Evaluation by ATSDR[7] or by other sources, for example, state public health agencies, of the threat to public health;
>
> (iii) Evaluation of the magnitude of the threat;
>
> (iv) Evaluation of factors necessary to make the determination of whether a removal is necessary; and
>
> (v) Determination of whether a nonfederal party is undertaking proper response.

40 C.F.R. § 300.410(c)(1).

"A removal site inspection may be performed if more information is needed." 40 C.F.R. § 300.410 (d). "The results of the removal site evaluation shall be documented." 40 C.F.R. § 300.410(g). Finally, "[t]he . . . lead agency shall ensure that natural resources trustees are promptly notified in order that they may initiate appropriate actions. . . . The . . . lead agency shall coordinate all response activities with such affected trustees." 40 C.F.R. § 300.410(h).[8]

Once the lead agency has reviewed the removal site evaluation, if it makes the determination that

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[7] The ATSDR is the Agency for Toxic Substances and Disease Registry. *See* 40 C.F.R. § 300.4.

[8] Natural resources trustees are federal officials who act on behalf of the public as trustees for natural resources. *See* 40 C.F.R. § 300.600(a).

there is a threat to public health or welfare as a result of "[a]ctual or potential contamination of drinking water supplies." It may take "any appropriate removal action." 40 C.F.R. § 300.415(b)(1) and (b)(2)(ii).[9]

Plaintiff offers no evidence at all to establish that it conducted a removal site evaluation and "first review[ed]" the removal site evaluation before "mak[ing] the determination that there [was] a threat to public health or welfare as a result of "[a]ctual or potential contamination of drinking water supplies." 40 C.F.R. § 300.415(b)(1) and (b)(2)(ii). This is not surprising given that it is undisputed that Plaintiff made its decision not to serve any water with detectable levels of perchlorate behind closed doors in meeting between Plaintiff's City Council and its City Attorney and that neither Plaintiff's staff nor its Water Director, alone or in collaboration with any consultants, prepared any written memoranda analyzing its decision or the rationale for its decision.

Given the complete absence of evidence that Plaintiff complied with any of the statutory requirements for initiating a removal action, summary judgment is appropriate on Plaintiff's CERCLA claims on this basis alone. But, even if Plaintiff had complied with the requirements for initiating a removal action, summary judgment would still be

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[9] 40 C.F.R. § 300.415(e) sets forth a list of generally appropriate removal actions. *See* note 13 *infra*.

appropriate because Plaintiff offers no evidence that it complied with any NCP requirements once it initiated a removal action.

2. Even if Plaintiff Had Property Determined that a Removal Action Should Be Initiated, Plaintiff Did Not Comply with Any of the NCP Requirements Once it Initiated a Removal Action.

The NCP provides that if the lead agency determines that a removal action is appropriate, removal activities shall begin as soon as possible, but, the lead agency must "at the earliest possible time . . . make any necessary determinations pursuant to paragraph b(4) of this section." 40 C.F.R. § 300.415(b)(3).

Paragraph (b)(4) provides that:

> Whenever a planning period of at least six months exists before on-site activities must be initiated, and the lead agency determines based on a site evaluation, that a removal action is appropriate:
>
> (i) The lead agency shall conduct an engineering evaluation/cost analysis (EE/CA) or its equivalent. The EE/CA is an analysis of removal alternatives for a site.
>
> (ii) If environmental samples are to be collected, the lead agency shall develop sampling and analysis plans that shall provide a process for obtaining data of sufficient quality and quantity to satisfy data needs.

> Sampling and analysis plans shall be reviewed and approved by EPA. The sampling and analysis plans shall consist of two parts:
>
> (A) The field sampling plan, which describes the number, type, and location of samples and the type of analyses; and
>
> (B) The quality assurance project plan, which describes policy, organization, and functional activities and the data quality objectives and measures necessary to achieve adequate data for use in planning and documenting the removal action.

40 C.F.R. § 300.415(b)(4).

The NCP also demands compliance with certain community relations requirements, including that a spokesperson be designated to inform the community of actions taken, to respond to inquiries, and to provide information concerning the hazardous substance release. *See* 40 C.F.R. § 300.415(n)(1).[10] The spokesperson must also notify, at a minimum, immediately affected citizens and state and local officials. *Id.*

Additionally, where on-site activities are expected to last more than 120 days from the time they are commenced, before the conclusion of that 120 day

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[10] Most but not all of the community relations requirements set forth in 40 C.F.R. § 300.415(n) are applicable to private party response actions. *See* 40 C.F.R. § 300.410(c)(6).

period, the lead agency must conduct interviews with local officials, members of the community, public interest groups or other interested parties to solicit their concerns and to determine whether they need any additional information and how they might like to be involved in the cleanup process. 40 C.F.R. § 300.415(n)(3). The lead agency must then prepare a formal community relations plan based on the interviews and must specify the community relations activities to be undertaken. *Id.*

Finally, where, based on the removal site evaluation, the lead agency determines that a removal action is appropriate and a planning period of at least six months exists prior to initiation of on-site removal activities, the lead agency must publish a notice of availability and brief description of the EE/CA in a local newspaper, must provide not less than thirty days for public comment after completion of the EE/CA and must prepare a written response to significant comments. *See* 40 C.F.R. § 300.415(n)(4).

Plaintiff offers no evidence to establish that it complied with any of the NCP requirements once it determined that a removal action should be initiated. Plaintiff first began monitoring for perchlorate in its wells in 1997. In 1997, again in 2001 and again in 2002, Plaintiff detected perchlorate in the Impacted Wells. In February and April of 2002, Plaintiff took the Impacted Wells out of service. In November 2002, Plaintiff was reviewing proposals for the installation of the Treatment System. In the Summer of 2003 installation of the Treatment System was complete.

Plaintiff had months, if not years, to comply with the NCP requirements once it determined that a removal action should be initiated.[11] Yet, it did nothing to comply with the NCP. [12]

Even if Plaintiff had properly initiated a removal action, the complete absence of evidence that Plaintiff complied with the NCP after it made a decision to initiate a removal action warrants summary judgment on Plaintiff's CERCLA claims.

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[11] Regardless of exactly when Plaintiff formally decided to initiate a removal action – when perchlorate was first detected in the Impacted Wells, when the Impacted Wells were taken out of service, or when the decision to install the Treatment System was made, Plaintiff had ample time to comply with the NCP requirements.

[12] The NCP also requires that a removal action "result in a level of cleanup . . . that at least meets the legally applicable or otherwise relevant and appropriate federal (or stricter state) requirements." *State of Ohio v. U.S. E.P.A.* 997 F.2d 1520, 1526 (D.C. Cir. 1993) (citing 42 U.S.C. § 9621(d)(2)(A)). *See also* 40 C.F.R. § 300.415(j) (applicable to section 107(s) cost recovery actions by a private party pursuant to 40. C.F.R. § 300.700(c)(5)(vi), and requiring that removal actions "attain applicable or relevant and appropriate (ARARs) under federal environmental or state environmental . . . laws."). Since Plaintiff was never legally required to stop serving water from the Impacted Wells, Plaintiff would never be able to satisfy this standard.

3. Even If Plaintiff Had Property Determined That a Removal Action Should be Initiated and Had Complied with the NCP Requirements, the Steps Actually taken by Plaintiff cannot Be Characterized as a Removal Action.

Even if Plaintiff had properly determined that a removal action should be initiated and even if Plaintiff had complied with the NCP requirements for a removal action, the steps Plaintiff actually undertook cannot properly be characterized as a removal action. "[R]emoval actions encompass interim, partial time-sensitive responses to take to counter serious threats to public health." *United States v. W.R. Grace & Co.*, 429 F.3d at 1245. The NCP provides a list of generally appropriate removal actions, including "provision of alternative water supply – where necessary immediately to reduce exposure to contaminated household water until such time as local authorities can satisfy the need for a permanent remedy." 40 C.F.R. § 300.415(e).[13]

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[13] The NCP list of generally appropriate removal activities also includes, constructing fences, installing warning signs or other security or site control precautions, installing drainage controls, stabilizing berms, dikes, or impoundments or drainage or closing of lagoons, capping of contaminated soils or sludges, using chemicals and other materials to retard the spread or mitigate the effects of release, excavating, consolidating, or removing highly contaminated soils, removing drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants and

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Plaintiff may have provided an alternative water supply after it removed the Impacted Wells from service when it "purchased replacement water from the City of San Bernardino to make up for loss of water from these wells." TAC ¶ 44C. However, the clear purpose of Plaintiff's installation of its Well-head Treatment Program was to treat its own water supply to remove detectable levels of perchlorate.

Additionally, the hallmark of a removal action is the need for immediate action. *United States v. W.R. Grace & Co.*, 429 F.3d at 1244 (noting that Courts stress "the immediacy of a threat in deciding whether or cleanup is a removal action.") *See also Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1157 (C.D.Cal. 2003) (finding private party's response action was remedial where "[t]here is no evidence in the record that the materials posed the type of threat to human health and welfare that required immediate action."). Since there was no legal requirement compelling Plaintiff to remove the Impacted Wells from service, Plaintiff can hardly be said to have acted in response to an immediate threat to public health or the environment.[14] *See*

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containing, treating, disposing, or incinerating hazardous materials. *See* 40 C.F.R. § 300.415(e).

[14] The Ninth Circuit has held that agency action is not a prerequisite to a determination that "contamination presents an environmental risk worthy of response." *Carson Harbor Village, Ltd. v. Unocal Corp*, 270 F.3d 863, 872 (9th Cir. 2001). However, there must be some evidence in the record that before initiating and undertaking a removal action, the lead agency made a

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Metropolitan Serv. Dist. v. Oregon Metal Finishers, Inc., 32 Env't. Rep. Cas. (BNA) 1102, 1990 WL 134537, *2-3 (D.Or. Sept. 11, 1990) (concluding that the response actions taken by plaintiff were remedial rather than removal actions because there was no evidence that contamination at the site posed an immediate threat to public health or the environment); *Sherwin-Williams Co. v. City of Hamtramck*, 840 F.Supp. 470, 475-476 (E.D.Mich. 1993) (finding that the City was engaged in a remedial action because it did not establish that there an imminent threat to health or safety, and because of the extended and protracted nature of the cleanup.).

There is no evidence in the record that the perchlorate detected in the Impacted Wells posed an immediate threat to public health or the environment.[15] Given the complete absence of evidence of an immediate threat to public health or the environment, the activities undertaken by Plaintiff cannot be

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determination that the release of a hazardous substance posed an immediate threat to public health or the environment. *See United States v. W.R. Grace & Co.*, 429 F.3d at 1247 (finding that "[c]rucial to our determination [that the EPA initiated and undertook a removal action] is the documented evidence that, absent immediate attention, the airborne toxic particles would continue to pose a substantial threat to public health.")

[15] Plaintiff offers the declaration of Court D. Sandau, a chemist, who opines that the levels of perchlorate "at concentrations of 5 to 10 ppb . . . pose a threat to human health." Declaration of Court Sandau ¶ 10. There is no evidence that Plaintiff consulted Mr. Sandau or anyone else (except its own City Attorney) prior to initiating a response action.

characterized as a removal action. Accordingly, because Plaintiff concedes that it did not undertake a remedial action in compliance with the NCP and because the Court finds that Plaintiff did not conduct a removal action in compliance with the NCP, summary judgment in favor of Defendant on Plaintiff's CERCLA claims in **GRANTED**.[16]

B. Plaintiff May Not Seek to Recover its Costs for the Activities it is Currently Undertaking to Effect a Basin-wide Cleanup of Perchlorate When None of Those Costs Were Incurred until Long after this Action Was Filed.

Plaintiff contends that summary judgment is not warranted because it seeks not just past response costs incurred in connection with the Wellhead Treatment Program, but also future response costs in connection with its Basin-wide Cleanup. Plaintiff contends that it is presently undertaking a remedial action on compliance with the NCP in connection with the Basin-wide Cleanup, that it has incurred

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[16] Plaintiff's eighth claim for Declaratory Relief pursuant to the Declaratory Judgment Act (28 U.S.C. § 2201, 2202) seeks a declaration of the parties legal rights and obligations in connection with Plaintiff's first and second claims for relief for recovery of response costs and contribution, respectively. Because the Court grants summary judgment in Defendants' favor on Plaintiff's first and second claims for relief, Defendants are entitled to summary judgment in their favor on Plaintiff's eighth claim for relief as well.

over $100,000 in costs so far, and that it anticipates incurring between $55 and $75 million dollars in the future. However, the insurmountable problem for Plaintiff is that, unless the costs incurred in connection with its Wellhead Treatment Program constitute recoverable response costs, the costs it has incurred in connection with its Basin-wide Cleanup cannot, by themselves, form the basis of Plaintiff's CERCLA action.

Plaintiff filed this action on February 28, 2005. The evidence in the record establishes that Plaintiff did not begin to undertake any activities, or incur any costs, in connection with its Basin-wide Cleanup until January, 2006, when DPRA began preparing the Workplan.[17] Thus, Plaintiff did not incur any potentially recoverable response costs in connection with the Basin-wide Cleanup until almost one year after filing this action.[18] Because the Court has determined that Plaintiff's Wellhead Treatment Program was not a removal action in compliance with the NCP, and Plaintiff's concedes that its Wellhead Treatment Program was not a remedial action in compliance

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[17] Because it is not necessary to the resolution of Defendant's Motion, the Court does not decide whether Plaintiff has initiated a remedial action in compliance with the NCP in connection with its Basin-wide Cleanup or whether the Workplan and the other activities currently being conducted are recoverable response costs.

[18] Even Plaintiff's TAC – the extant pleading in this action – was filed in December, 2005, before Plaintiff incurred any response costs in connection with the Basin-wide Cleanup.

with the NCP, none of the costs Plaintiff incurred in connection with the Wellhead Treatment Program is recoverable as a response cost. As a result, at the time Plaintiff filed this action it had not incurred any recoverable response costs.

Even assuming arguendo that the activities currently being undertaken by Plaintiff in connection with the Basin-wide Cleanup are recoverable response costs, none of the costs were incurred until almost one year after Plaintiff filed this action. Because none of the costs incurred in connection with the Basin-wide Cleanup were incurred prior to Plaintiff's filing suit, these costs cannot form the basis of Plaintiff's CERCLA action. *See In re Dant & Russell, Inc.*, 951 F.2d 246, 249-250 (9th Cir. 1991) (noting that CERCLA requires plaintiffs to actually incur response costs before they can sue to recover them.); Ascon Properties, Inc. v. Mobil Oil Co. 866 F.2d 1149, 1154 (9th Cir. 1989) (confirming that a CERCLA claim does not arise until at least some cleanup costs have been incurred.); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316 (9th Cir. 1986) (determining that a private action under CERCLA cannot be commenced prior to incurrence of cleanup costs); *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F.Supp. 1437, 1450-1452 (S.D.Fla. 1984) (same). Thus, although Plaintiff may be able to recover its costs in connection with the Basin-wide Cleanup, it may not attempt to do so here.

C. The Court Declines to Exercise Supplement Jurisdiction over Plaintiff's State Law Claims.

In its TAC, Plaintiff asserts six state law claims for relief.

"The district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Once supplemental jurisdiction has been established under section 1367(a), the district court "can decline to assert supplemental jurisdiction over a pendant claim only if one of the four categories specifically enumerated in section 1367(c) applies." *Executive Software North America v. U.S. Dist. Court for Cent. Dist. of California*, 24 F.3d 1545, 1555-56 (9th Cir. 1994).

The four bases to decline supplemental jurisdiction under § 1367(c) are: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates the claims over which the district court has original jurisdiction, (3) the district court dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *Id.* at 1556.

This Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims because the court has dismissed all claims over which it had

original jurisdiction. *See* 28 U.S.C. § 1367(c)(3). Accordingly, Plaintiff's supplemental state law claims are dismissed without prejudice.[19]

IV. CONCLUSION

Based on the foregoing, the Court finds that there are no genuine issues of material fact in dispute, and Defendants are entitled to summary judgment in their favor on Plaintiff's first, second and eighth claims for relief. Accordingly, Defendants' Motion for Summary Judgment is **GRANTED**. Additionally, the Court declines to exercise supplemental jurisdiction over Plaintiff's six state law claims. Accordingly, Plaintiff's state law claims are **DISMISSED without prejudice**.

The Court finds that its ruling granting Defendants' Motion for Summary Judgment "is equally effective in barring the claim[s] against the [non-moving] defendants, and the plaintiff had an adequate opportunity to argue in opposition to the motion." *Kennedy v. Children's Service Society of Wisconsin*, 17 F.3d 980, 983 n.1 (7th Cir. 1994) (citation omitted); *see also Hubbard v. 7-Eleven, Inc.*, 433

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[19] Section 1367(d) provides that: "[t]he period of limitation for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d).

F.Supp. 2d 1134, 1149-1150 (S.D. Cal. 2006) (granting summary judgment were equally applicable to non-moving defendant and plaintiff had an adequate opportunity to address the issues.). Accordingly, the Court *sua sponte* enters summary judgment in favor or all non-moving defendants.

In light of the Court's granting summary judgment on all of Plaintiff's CERCLA claims, the Counterclaims and/or Cross-claims filed by Defendants seeking contribution and declaratory relief pursuant to CERCLA and/or the Declaratory Judgment Act are dismissed. The Court declines to exercise jurisdiction over the state law claims alleged in the Counterclaims and Cross-claims and dismisses those claims without prejudice. *See* 28 U.S.C. § 1367(c)(3).[20]

The Court shall enter Judgment in this action against Plaintiff and in favor of all Defendants on Plaintiff's First, Second and Eighth claims for relief.[21]

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[20] *See* note 18 *supra*.

[21] On November 18, 2005, defaults were entered against defendants Apollo Manufacturing Co., Atlas Fireworks Company, Inc., California Fireworks Display Company, Pyrotronics Corp., Red Devil Fireworks Company, and United Fireworks Manufacturing Company, Inc. ("Defaulting Defendants"). Default judgment has not been entered against any of the Defaulting Defendants. In light of the Court's ruling granting Defendants' Motion for Summary Judgment which precludes Plaintiff from obtaining a default judgment against the Defaulting Defendants on its CERCLA claims, and in light of Plaintiff's failure to diligently move for default judgment, the Court dismisses the Defaulting Defendants. Additionally, on January

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Counsel shall make arrangements with the Courtroom Deputy to retrieve any original exhibits filed in connection with this Motion.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

27, 2006, default was entered against cross-defendant Denova Environmental, Inc. ("Denova") on Pyro Spectaculars, Inc., ("PSI") Cross-claim. In light of the Court's dismissal of all Counterclaims and/or Cross-claims filed by Defendants seeking contribution and declaratory relief pursuant to CERCLA and/or the Declaratory Judgment Act, and declining to exercise jurisdiction over any state law claims, PSI's Cross-claim against Denova is dismissed.

42 U.S.C. § 9613(g)

* * *

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is

diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced –

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this sub-section, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further

response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after –

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this sub-chapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run –

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

* * *

Appeal No. 06-56727, 06-56718, 07-55027

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF COLTON,

Appellant,

vs.

AMERICAN PROMOTIONAL EVENTS, INC.-WEST, et al.,

Respondents.

On Appeal From the United States District Court for the Hon. John F. Walter
Case No. CV 05-01479 JFW (Ex)

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* * *

* * * Colton may have the right to obtain future cost recovery against some defendants pursuant to its declaratory claim in this case, but may *not* have the same right pursuant to its claims in its new action. One of the major defendants in both Colton's original action and new action is Black & Decker, Inc. (B&D), which a successor to defendant Emhart Industries (Emhart), a Connecticut corporation, which in turn is a successor to defendant Kwikset Locks, Inc. (Kwikset). ER 4-5 (original complaint); Goodrich Supplemental Excerpts of Record ("Goodrich SER") 134 (new complaint). Emhart was dissolved as a Connecticut corporation on March 12, 2002, and, under Connecticut law, an action against a dissolved corporation must be brought within three years after dissolution.[8]

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[8] Under Connecticut law, a claim against a dissolved corporation is barred unless brought "within three years after the publication date of the newspaper notice" announcing the dissolution. Conn. Gen. Stat., Corp. Code § 33-887(b), -(c). The publication date of the newspaper notice announcing Emhart's dissolution was March 12, 2002. Kwikset and Emhart have asserted, in their answers to Colton's complaint in the new

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Colton's original complaint was filed on February 28, 2005, ER 160, and its new complaint was filed on November 22, 2006. Goodrich SER 171. Therefore, the original complaint was filed within three years after corporate dissolution, and the new complaint more than three years after dissolution. Based on these facts, Kwikset and Emhart have asserted as a defense to Colton's new action that they lack the capacity to be sued, *see* note 8, *supra*, and, since B&D is also a successor in interest, presumably the same defense is available to B&D. These defendants did not, however, assert the same defense in Colton's original action. Thus, some major defendants assert a statute of limitation defense to Colton's new action that they did not, and could not, assert to its original action. Colton's declaratory relief claim in this case is not moot for this additional reason.

* * *

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action, that Kwikset and Emhart lack the capacity to be sued because of Emhart's dissolution as a Connecticut corporation in 2002. Kwikset Answer, Twenty-Third Aff. Defense, p. 27; Emhart Answer, Twenty-Third Aff. Defense, p. 26. Colton has filed a request that the court grant judicial notice of the relevant portion of the Connecticut statute, the publication date of the newspaper notice announcing Emhart's dissolution, and Kwikset's and Emhart's pleadings alleging lack of capacity to be sued.

No. 10-284

OCT 27 2010

IN THE

Supreme Court of the United States

CITY OF COLTON,

Petitioner,

v.

AMERICAN PROMOTIONAL EVENTS, INC. – WEST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the court of appeals correctly applied the well-established principle that a precisely drawn, detailed statute preempts more general remedies, in holding that a municipality seeking declaratory relief regarding hypothetical future liability for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767, codified as amended at 42 U.S.C. §§ 9601-9675, cannot obtain relief under the general provisions of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), but must instead satisfy the statutory prerequisites to declaratory relief specifically set forth in CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2).

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state the following with respect to the non-governmental corporate respondents listed below:

American Promotional Events, Inc. - West

American Promotional Events, Inc., is the parent corporation of respondent American Promotional Events, Inc. – West, and there is no publicly held corporation that owns more than 10% of its stock.

Astro Pyrotechnics, Inc.

Astro Pyrotechnics, Inc., has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Black & Decker Inc.

Black & Decker Inc. is an indirectly wholly owned subsidiary of The Black & Decker Corporation. The Black & Decker Corporation is a wholly owned subsidiary of Stanley Black & Decker, Inc., a publicly traded corporation.

Emhart Industries, Inc.

Black & Decker Inc. was the sole shareholder of Emhart Industries, Inc., until the latter was dissolved as a corporation in 2002.

Goodrich Corporation

Goodrich Corporation has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Kwikset Locks, Inc.

Emhart Industries, Inc., was the sole shareholder of Kwikset Locks, Inc., until the latter was dissolved as a corporation in 1958.

Pyro Spectaculars, Inc.

Pyro Spectaculars, Inc., has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Trojan Fireworks, Co.

Trojan Fireworks Co. has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Whittaker Corporation

Meggitt America, Inc., is the parent corporation of Whittaker Corporation. Meggitt PLC is a public limited company organized under the laws of England and Wales and is the ultimate parent company of Meggitt America, Inc.

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40 C.F.R. § 300.700(c)(6) 3

BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioner contends that certiorari is merited because the circuits are allegedly divided over the question whether plaintiffs who fail to establish liability for past response costs under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, and are therefore barred from obtaining declaratory relief under CERCLA's specifically tailored provision governing such relief (CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2)), can nonetheless seek declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Petitioner's contention is incorrect. There is no circuit conflict over the question presented; indeed, the court below is the first appellate court to have decided it. Moreover, the court of appeals correctly applied long-established principles of statutory construction and this Court's settled case law in reaching the unremarkable conclusion that a specific congressionally enacted remedial scheme trumps a more general one. Further review of this narrow question of first impression is not warranted.

STATEMENT OF CASE

I. Legal Background

Recognizing the need to provide legal structure, technical guidance, and systematic funding for handling non-petroleum hazardous waste sites, in 1980 Congress enacted CERCLA as "a comprehensive statutory scheme to respond to environmental threats, obtain compensation from those responsible for the polluting activities, and assign liability to responsible parties." *United States v. W.R. Grace &*

Co., 429 F.3d 1224, 1227 (9th Cir. 2005). CERCLA confers substantial authority on the federal, state, and tribal governments to clean up hazardous waste sites and recover the costs (referred to as "response costs") from responsible parties. *E.g.*, 42 U.S.C. § 9607(a)(1-4)(A). In addition, CERCLA allows a non-sovereign plaintiff (*i.e.*, a party other than the United States, a State, or an Indian Tribe) who incurs response costs to recover such costs if the plaintiff establishes:

> (1) the property at issue is a "facility" as defined in 42 U.S.C. § 9601(9); (2) a "release" or "threatened release" of a "hazardous substance" has occurred; (3) the "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan"; and (4) the defendants are in one of four classes of persons subject to liability under § 9607(a).

Carson Harbor Vill. v. Cnty. of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006). The plaintiff has "the burden of proving that cleanup costs associated with remedial actions are consistent with the National Contingency Plan" in order "to recover those cleanup costs under CERCLA." *Id.* (citing 42 U.S.C. § 9607(a)(1-4)(B)).

The National Contingency Plan ("NCP") "specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency (EPA)." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 n.2

(2004).[1] The NCP "outlines specific steps parties must take in choosing a remedial action plan and cleaning up hazardous waste. . . . [It] requires that the party seeking recovery provide an opportunity for public comment and participation, conduct a remedial site investigation, and prepare a feasibility study." *Carson Harbor Vill.*, 433 F.3d at 1265-66 (citing 40 C.F.R. § 300.700(c)(5)(vii)-(viii), (c)(6)).

Thus, CERCLA gives non-sovereign parties like petitioner the ability to exert powerful cost recovery tools that Congress intended primarily for sovereign governments. As an important check-and-balance on allowing use of these tools by non-sovereign entities, however, Congress mandated consistency with the NCP and CERCLA-quality cleanups as prerequisites to recovery.

II. Factual and Procedural Background

In 2002, petitioner detected low levels of perchlorate in certain of its municipal water supply wells. Although the perchlorate levels did not then violate any enforceable water quality standards promulgated by the California Department of Health Services, which regulates water quality, petitioner nonetheless chose to take the wells out of service and institute a wellhead treatment program to eliminate the perchlorate. Pet. App. 6.

In 2005, petitioner filed suit under CERCLA against numerous entities, including respondents, claiming that they were responsible for the costs in-

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[1] The NCP is formally titled the National Oil and Hazardous Substances Pollution Contingency Plan and is set forth at 40 C.F.R. Part 300, *et seq.*

curred by petitioner in implementing its wellhead treatment program. Petitioner sought retrospective monetary relief as well as a declaratory judgment governing future response costs. The district court granted summary judgment for all defendants, holding that petitioner had failed to comply with the NCP in connection with the wellhead treatment program and was therefore precluded from recovering response costs under CERCLA § 107(a). Pet. App. 6-7; *id.* at 20-48.

As required by CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), the district court also entered judgment in favor of respondents on petitioner's claim for a declaratory judgment regarding future response costs for its wellhead treatment program:

> Plaintiff's eighth claim for Declaratory Relief pursuant to the Declaratory Judgment Act (28 U.S.C. § 2201, 2202) seeks a declaration of the parties [*sic*] legal rights and obligations in connection with Plaintiff's first and second claims for relief for recovery of response costs [under CERCLA § 107] and contribution [under CERCLA § 113(f)], respectively. Because the Court grants summary judgment in Defendants' favor on Plaintiff's first and second claims for relief, Defendants are entitled to summary judgment in their favor on Plaintiff's eighth claim for [declaratory] relief as well.

Pet. App. 42 n.16. Shortly thereafter, the district court entered judgment in favor of respondents, dismissing petitioner's CERCLA and declaratory judgment claims. Dkt. entry 578.

Petitioner appealed, and the court of appeals affirmed. Pet. App. 1-19. Petitioner conceded, how-

ever, "that it failed to comply with the national contingency plan in its past response action" regarding the wellhead treatment program. *Id.* at 8. The court of appeals therefore held that petitioner was precluded from recovering those costs under CERCLA. *Id.*

Notwithstanding its lack of entitlement to recover any response costs, petitioner argued on appeal that it was entitled to a declaratory judgment establishing respondents' hypothetical liability for future NCP-compliant, CERCLA-quality response costs that might be incurred by petitioner. Pet. App. 9. The court of appeals held that this request for relief was ripe for decision, notwithstanding its hypothetical nature, because petitioner had "incurred costs in responding to the contamination" and Ninth Circuit law did not require "that a party incur *recoverable*—*i.e.*, necessary and NCP-compliant—response costs before its claim for declaratory relief is ripe." *Id.* at 10-11. The court of appeals also held that petitioner's lack of a cause of action for past response costs did not deprive the federal courts of subject matter jurisdiction over petitioner's request for declaratory relief, reasoning that petitioner's "nonfrivolous assertion of a CERCLA declaratory relief claim is . . . sufficient to confer federal subject matter jurisdiction." *Id.* at 13-14.

Turning to the merits of petitioner's request for prospective declaratory relief imposing potential liability for future response costs, the court of appeals held that the declaratory-judgment provision in CERCLA § 113(g)(2) governs the right to declaratory relief in CERCLA actions:

> Although [petitioner's] complaint referred to the Declaratory Judgment Act rather than

> CERCLA section 113(g)(2), the latter provision clearly governs this initial cost-recovery action. Because "a precisely drawn, detailed statute pre-empts more general remedies," *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks omitted), we must consider whether [petitioner] was entitled to declaratory relief under CERCLA's more detailed declaratory relief provision.

Pet. App. 16.

The court of appeals then considered the specific provisions of CERCLA § 113(g)(2) governing the availability of declaratory relief. Noting that the declaratory relief contemplated by § 113(g)(2) "pertains to 'liability for response costs,'" the court reasoned that "[s]uch 'liability for response costs' must refer to the response costs sought in the initial cost-recovery action, given that the sentence later refers to 'any *subsequent* action or actions to recover *further* response costs.'" Pet. App. 16. Petitioner, however, had not succeeded in establishing any such "liability for response costs":

> [Petitioner] has failed to establish present liability because of its conceded failure to comply with the NCP but seeks a declaratory judgment on *future* liability. Section 113(g)(2), however, does not provide for such relief. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

Id. at 17 (citation omitted; emphasis in original). As the court explained, "Congress specified a mechanism whereby a declaration of liability for costs al-

ready incurred has preclusive effect in future proceedings as to costs yet to be incurred. If Congress had intended for a declaration of future liability to be available" even absent any showing of liability for past response costs (as here), "it could have provided that 'the court shall enter a declaratory judgment on liability for *further* response costs.' That it did not leads us to conclude that declaratory relief is available only if liability for past costs has been established under section 107." *Id.*

The court of appeals also rejected petitioner's contention that "CERCLA's goal" of encouraging cleanups supported petitioner's request for relief. Pet. App. 17. As the court observed, "CERCLA's goal . . . is not simply to encourage private response, but rather to 'make the party seeking response costs choose a cost-effective course of action to protect public health and the environment' and to achieve 'a CERCLA-quality cleanup.'" *Id.* at 17-18 (citation omitted). "Providing declaratory relief based on mere assurances of future compliance" would "create little incentive" for initial NCP compliance and would require courts "to make complicated determinations as to which defendants are responsible for what proportion of the release, without any assurance that the plaintiff would ever" conduct a proper cleanup. *Id.* at 18. Accordingly, the court concluded that "CERCLA's purposes would be better served by encouraging a plaintiff to come to court only after demonstrating its commitment to comply with the NCP and undertake a CERCLA-quality cleanup." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner does not challenge, and indeed concedes (Pet. 11-12, 19-20), the correctness of the court of appeals' holdings that petitioner's failure to com-

ply with the NCP precludes it from obtaining either an award of past response costs under CERCLA § 107(a) or declaratory relief regarding potential future response costs under CERCLA § 113(g)(2). As the case comes to this Court, therefore, it is established that petitioner has no claim for relief under CERCLA itself. The only issue raised by petitioner and fairly included in the question presented is whether, notwithstanding its inability to establish any right to relief under CERCLA itself (including CERCLA's specific provision governing declaratory relief, CERCLA § 113(g)(2)), petitioner should nonetheless be permitted to obtain prospective and hypothetical relief under the general provisions of the Declaratory Judgment Act. Petitioner's implausible claim that such relief is available under the Declaratory Judgment Act was correctly rejected below, has never been addressed by any other appellate court, and does not merit further review.

I. There Is No Conflict In The Circuits On The Question Presented

The court of appeals held that the declaratory relief provision of CERCLA § 113(g)(2), and not the more general terms of the Declaratory Judgment Act, "clearly governs this initial cost-recovery action," based on this Court's instruction that "'a precisely drawn, detailed statute pre-empts more general remedies.'" Pet. App. 16 (quoting *Hinck*, 550 U.S. at 506). In reaching that conclusion, the court of appeals did not reference any decision by any other appellate court that has resolved this narrow question of the interplay between the Declaratory Judgment

Act and CERCLA § 113(g)(2), and respondents are aware of no such decision.[2]

Since none of the other circuits has reached the question presented here, there is no conflict that could possibly justify this Court's intervention. Petitioner nonetheless contends that the decision below conflicts with *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991) (per curiam), and *United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001). In reality, however, neither *Tinney* nor *Davis* even resolves the question presented, let alone in a manner that gives rise to a circuit conflict.

A. *Tinney* Does Not Conflict With The Decision Below

In *Tinney*, plaintiffs brought a CERCLA action to recover costs incurred to investigate and close a landfill—no request for a declaratory judgment regarding future costs was at issue. 933 F.2d at 1510. The dis-

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[2] The court of appeals did comment that some courts "have held or suggested that recoverable past costs are a sine qua non for declaratory relief *under CERCLA*," and that others "have held or suggested that declaratory relief may be available even in the absence of recoverable past costs." Pet. App. 15 (emphasis added). None of these cases, however, resolves the question whether declaratory relief is available *under the Declaratory Judgment Act* in the absence of recoverable past costs, and (as discussed in text below) the two cases cited by the court of appeals as allegedly indicating that declaratory relief may be available do *not* hold that the Declaratory Judgment Act authorizes relief in these circumstances, and are instead entirely consistent with the resolution of that issue reached by the court below.

trict court dismissed the claims on summary judgment for failure to comply with the NCP. *Id.* at 1511. The Tenth Circuit affirmed, holding (consistent with the decision below in this case) that "[p]roof of response costs incurred 'consistent with' the NCP is . . . an element of a prima facie private cost recovery action under CERCLA." *Id.* at 1512. Because the plaintiffs had "incurred no costs consistent with the NCP," the court concluded that "CERCLA provides them no remedy." *Id.* Thus, the *Tinney* court's actual holding is entirely consistent with the reasoning and holding of the decision below.

To be sure, the *Tinney* court went on to comment in passing that "there are some circumstances in which a CERCLA plaintiff *may* be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that *all* of its claimed response costs were incurred consistent with the NCP," such as cases "in which the factual record does not permit a determination of consistency with the NCP at the time the motion for summary judgment is filed" or "the plaintiff seeks only a declaration of the defendant's liability for future costs incurred consistent with the NCP." 933 F.2d at 1513 (emphases added). Contrary to petitioner's assertions, this passing observation does not give rise to a circuit conflict.

In the first place, the comment on which petitioner relies is unquestionably pure dictum. On its face, it states only that a plaintiff "*may*" be entitled to declaratory relief in some potential situations. The hypothetical circumstance being described—that of a plaintiff who has not yet had the opportunity to establish NCP compliance—was *not* before the court in *Tinney*, as the court explicitly emphasized imme-

diately after the passage cited by petitioner. *See* 933 F.2d at 1513 ("In cases such as this one, however, where there is a fully developed record on which to make the NCP consistency determination, there is nothing to be gained by delaying this determination until trial."). Thus, this passing dictum regarding fact situations not before the court plainly is not (and does not purport to be) a binding statement of the law, and thus it cannot support petitioner's claim of a circuit conflict.

Second, upon careful examination, this dictum is of no assistance to petitioner even on its own terms. The hypothetical situation commented upon by the *Tinney* court was one in which "plaintiff has not yet established that *all* of its claimed response costs were incurred consistent with the NCP," 933 F.2d at 1513 (emphasis added)—not situations in which, as here, the court has already found that *none* of the plaintiff's costs were NCP-compliant. Thus, in the district court cases cited by the *Tinney* court as illustrative, there appears to have been no doubt that *some* recoverable response costs had been incurred by the plaintiff who was seeking declaratory relief.[3]

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[3] *See, e.g., Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J.) ("Remedial investigations such as the one undertaken by Southland are consistently held to be within the scope of response costs."), *modified in part on other grounds*, No. Civ. 88-0700, 1988 WL 125855 (D.N.J. Nov 23, 1988); *United States v. Mottolo*, 695 F. Supp. 615, 623 (D.N.H. 1988) ("[i]t is undisputed that the United States and New Hampshire *have incurred* and face future response costs") (emphasis added); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 709 (D.N.J. 1988) ("it is clear that certain items which T &

[Footnote continued on next page]

Here, by contrast, it is undisputed that *none* of the past cleanup costs asserted in this case were recoverable under CERCLA.

In light of the foregoing, it is not surprising that, in the nearly twenty years since the Tenth Circuit made its passing comment in *Tinney*, no court has ever rendered a published opinion granting a declaratory judgment awarding future CERCLA cleanup costs even though the court has concluded that the plaintiff failed to establish any NCP-compliant response costs and is therefore unable to obtain relief under CERCLA § 107. At most, some district courts have concluded that proof of NCP compliance might not be necessary where the plaintiff's existing costs are preliminary, representing the earliest stages of monitoring and evaluating a release of hazardous substances.[4] The instant case, in which petitioner "concede[d] . . . that it failed to comply with the national contingency plan in its past response action" (Pet. App. 8), is far removed from such circumstances.

In short, the *Tinney* court's holding is entirely in accord with the decision below, and its cryptic dictum regarding the possible availability of declaratory relief in hypothetical circumstances not before the court does not speak to the factual circumstances of

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E seeks to recover are included within the meaning of response costs under CERCLA").

[4] *See, e.g., Bowen Eng'g v. Estate of Reeve*, 799 F. Supp. 467, 477 (D.N.J. 1992), *aff'd*, 19 F.3d 642 (3d Cir. 1994).

this case and, in any event, falls far short of a binding legal pronouncement that could give rise to a circuit conflict. Petitioner's claim of a conflict between *Tinney* and the decision below is unfounded.

B. *Davis* Does Not Conflict With The Decision Below

Petitioner's claim of a conflict between the decision below and the First Circuit's decision in *Davis* is equally unfounded. In *Davis*, the United States sued defendant United Technologies Corporation ("UTC") under CERCLA § 107 to recover costs incurred by the government in cleaning up a contaminated site. 261 F.3d at 14-15. During the first phase of the case, the district court found UTC jointly and severally liable for the government's cleanup costs. *Id.* at 14. UTC sought contribution (including declaratory relief with respect to future cleanup costs) from other potentially responsible parties under CERCLA's express contribution provision, CERCLA § 113(f), 42 U.S.C. § 9613(f), and the district court entered declaratory judgment allocating a share of responsibility for UTC's future cleanup costs to certain defendants. *Id.* at 15, 18.[5]

The First Circuit affirmed the award of declaratory relief. The court held that CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), authorizes declaratory relief in the context of contribution claims brought under

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[5] CERCLA creates two "clearly distinct" rights to sue for monetary relief: "a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B)." *Cooper Indus.*, 543 U.S. at 163 & n.3.

CERCLA § 113(f), 42 U.S.C. § 9613(f): "[T]he Ninth and Tenth Circuits have taken the position, as we do here, that § 9613(g)(2), the declaratory judgment provision of CERCLA, applies to § 9613(f) contribution actions for both past and future response costs." 261 F.3d at 46.

As a result of its holding that § 113(g)(2) authorized the declaratory relief awarded by the district court, the First Circuit concluded that it "need not address in detail the [defendants'] arguments that the district court's entry of a declaratory judgment was improper under the Declaratory Judgment Act because there was no case or controversy permitting the court to act." 261 F.3d at 47. In the court's view, UTC's binding obligation to pay cleanup costs (pursuant to a consent decree entered in resolution of the CERCLA § 107 cost-recovery claims brought by the United States) created a sufficient actual controversy between UTC and the contribution defendants to support declaratory relief under CERCLA § 113(g)(2) allocating cleanup costs among UTC and the defendants. *Id.* at 47-49.

Petitioner thus errs in characterizing *Davis* as holding "that a CERCLA plaintiff was entitled to declaratory relief for future response costs *under the Declaratory Judgment Act*, as well as CERCLA section 113(g)(2)." Pet. 16 (emphasis added). *Davis* explicitly and unequivocally holds instead that, in a contribution action under CERCLA § 113(f), claims for declaratory relief with respect to future CERCLA cleanup costs arise under and are governed by CERCLA's declaratory judgment provision, CERCLA § 113(g)(2): "§ 9613(g)(2) . . . applies to § 9613(f) contribution actions for both past and future response costs." 261 F.3d at 46. That holding is entirely con-

sistent with the decision below, which did *not* involve a contribution action under § 113(f) but rather a cost recovery action under § 107(a), and which in any event reached the analogous conclusion that claims for declaratory relief in cost-recovery actions are likewise governed by CERCLA § 113(g)(2). Nowhere does *Davis* hold or suggest that a plaintiff (like petitioner) in a cost recovery action who is *not* entitled to proceed under CERCLA § 113(g)(2) could nonetheless obtain relief under the Declaratory Judgment Act, and any such suggestion would have been mere dictum in any event because relief under § 113(g)(2) *was* available in *Davis*. There is therefore no possible conflict between *Davis* and the decision below.[6]

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[6] Petitioner also points to *Reichhold, Inc. v. United States Metals Refining Co.*, 522 F. Supp. 2d 724, 728 (D.N.J. 2007). Pet. 20. That district court decision is likewise consistent with the decision below. The *Reichhold* court stated that "CERCLA does not specifically provide for declaratory relief for § 113(f) contribution claims, so a party must satisfy the requirements of the Declaratory Judgment Act in order to be entitled to declaratory relief under section 113(f)." 522 F. Supp. 2d at 728. Whatever the validity or import of that statement, it has nothing to do with this case, which was not a contribution action involving declaratory relief under CERCLA § 113(f) but was instead a putative cost recovery action under CERCLA § 107(a), where it is undisputed that CERCLA *does* "specifically provide for declaratory relief," in § 113(g)(2). *Reichhold* itself illustrates this crucial distinction, because after making the statement cited by petitioner with respect to contribution actions, the *Reichhold* court went on to adopt precisely the same position as the court below with respect to declaratory relief in cost recovery actions: "To be entitled to declaratory relief *under § 107(a)*, a party need

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II. The Decision Below Was Correctly Decided

A. The Decision Below Is Consistent With This Court's Jurisprudence Giving Effect To More Specific Statutory Remedies

The decision below embraces this Court's jurisprudence that a specific and detailed statutory remedy will be given effect in lieu of a more general remedy. Pet. App. 16 (citing *Hinck,* 550 U.S. at 506). That rule enjoys a long history of support in this Court's prior decisions. "In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976) (holding that the Civil Rights Act of 1964 preempted all other "literally applicable" remedies for federal employment discrimination); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (the provision of an express means of redress indicates that Congress did not intend to leave a broader remedy open); *Block v. North Dakota ex rel Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 284-85 (1983) (allowing general remedy of an "officer's suit" to avoid statute of limitations in the Quiet Title Act would undermine "all of the carefully crafted provisions of the [Act] deemed necessary for the protection of the national public interest").

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only prove liability *for costs already incurred*." *Id.* at 729 (emphases added).

In this case, petitioner seeks relief under a general remedial provision (the Declaratory Judgment Act) because petitioner is unable to meet the requirements for relief under the specifically applicable remedial provision (CERCLA § 113(g)(2)) and is concerned about a potential statute-of-limitations bar to such relief in a separate case. Pet. App. 12-13. But the fact that petitioner faces such obstacles is no justification for disregarding the rule that specific statutory remedies preempt general ones. To the contrary, Congress's enactment of careful tailored limitations on the availability of declaratory relief under CERCLA would be rendered nugatory if claimants could evade those limitations at will merely by seeking relief under a more general remedial statute. *See Brown*, 425 U.S. at 833 ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."); *Block*, 461 U.S. at 285 (same).

This Court's holding in *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007), is instructive. The plaintiff in that case challenged a tax levy under the general tax refund statute, 28 U.S.C. § 1346, instead of the statute specifically authorizing claims of wrongful tax levy, 26 U.S.C. § 7426, in an effort to avoid the nine-month limitation period applicable to the latter claim. This Court unanimously rejected the plaintiff's attempt to "effortlessly evade" the limitations period governing the more specific remedy, explaining that "[i]t braces the preemption claim when resort to a general remedy would effectively extend the limitations period for the specific one." 550 U.S. at 434. Thus, *EC Term of Years* confirms that petitioner's desire to circumvent the statute of

limitations is not a valid reason for eschewing the better-fitted statutory remedy.

B. *Hinck* Is Applicable And Section 113(g)(2) Does Not Authorize Separate And Distinct Remedies

Petitioner challenges the merits of the decision below, arguing that it was wrongly decided because *Hinck* is inapplicable and, under *Morton v. Mancari*, 417 U.S. 535 (1974), § 113(g)(2) and the Declaratory Judgment Act should be construed to provide separate and distinct declaratory judgment remedies in CERCLA actions. Pet. 18-29. Those arguments are incorrect, and in any event provide no basis for a grant of certiorari.

First, the Declaratory Judgment Act is purely remedial in nature; it does not supply either an independent basis for federal jurisdiction[7] or a federal cause of action.[8] In this case, petitioner's conceded failure to comply with the NCP before filing suit

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[7] *Cat Tech LLC v. TubeMaster, Inc.*, 528 F.3d 871, 879 (Fed. Cir. 2008) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937)) (Declaratory Judgment Act applies "only if the court has jurisdiction from some other source"); *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("The Declaratory Judgment Act . . . is not an independent grant of jurisdiction, rather jurisdiction must be predicated on some other statute.").

[8] *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007) ("[28 U.S.C.] § 2201 does not create an independent cause of action"); *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982) ("Section 2201 does not provide an independent cause of action for determination of the constitutionality of a statute").

doomed its CERCLA case. Indeed, petitioner now concedes that for purposes of this case it has no right to either a cost recovery remedy or declaratory relief under the provisions of CERCLA itself, and thus it has no federal cause of action (and no remaining basis for federal jurisdiction). Petitioner cannot rely on the Declaratory Judgment Act to supply those missing elements of its claim.[9]

Second, Petitioner claims that the decision below is inconsistent with *Mancari*, 417 U.S. at 549. Pet. 22-23. Plainly there could be no actual conflict be-

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[9] In addition to these threshold obstacles to reaching the merits of the question presented, an additional hurdle presents itself: whether petitioner's request for relief satisfies the ripeness requirement. *See, e.g., Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks omitted). Although the court of appeals deemed petitioner's request for future declaratory relief ripe in light of Ninth Circuit precedent (Pet. App. 10-11), the declaratory judgment sought by petitioner would not fully resolve the parties' dispute, because it would establish liability only for what is at present a hypothetical category of damages—namely, cleanup costs (if any) that petitioner subsequently proves to have been the result of an NCP-compliant and CERCLA-quality cleanup. This Court has declined to award declaratory relief that resolves only some, but not all, of the parties' dispute. *See, e.g., Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (rejecting declaratory relief where "[t]he present declaratory judgment action would not completely resolve [the plaintiffs'] challenges, but would simply carve out one issue in the dispute for separate adjudication").

tween *Mancari* and this case, because they involve entirely different and wholly unrelated statutory schemes. Nor is there any inconsistency in reasoning between the two cases. *Mancari* merely reaffirmed the principle that "repeals by implication are not favored," 417 U.S. at 549 (internal quotation marks omitted), but that principle has no application here, where the court below did not hold or suggest that CERCLA § 113(g)(2) has repealed the Declaratory Judgment Act in all of its applications. In *Mancari*, the claim was that the Indian employment preference created by the Indian Reorganization Act of 1934 had been completely "eliminate[d]" and deprived of any continuing effect by the Equal Employment Opportunity Act of 1972. 417 U.S. at 548; *see id.* at 545, 547. Here, by contrast, the Declaratory Judgment Act has not been "eliminate[d]"; it continues to operate in a wide array of contexts.

Moreover, unlike the present case, in *Mancari* there was no claim that the Equal Employment Opportunity Act was a more specific remedial statute that preempted the more general Indian Reorganization Act. In fact, precisely the opposite was true. As the Court explained:

> the Indian preference statute is a specific provision applying to a very specific situation. The 1972 [Equal Employment Opportunity] Act, on the other hand, is of general application. Where there is no clear intention otherwise, *a specific statute will not be controlled or nullified by a general one*, regardless of the priority of enactment.

417 U.S. at 550-51 (emphasis added). Precisely the same preference for specific over general statutes undergirds the decision in this case. Giving effect to

the more specific enactment is even more appropriate in this case than it was in *Mancari*, because the precisely drawn language of § 113(g)(2) was enacted in 1986, long after the Declaratory Judgment Act was enacted in 1934.[10] Thus, under *Mancari*, the decision below was correctly decided.

Third, recognizing a backdoor route to declaratory relief in CERCLA cost recovery cases by means of the Declaratory Judgment Act would emasculate the statutory scheme that requires NCP compliance and a CERCLA-quality cleanup as a prerequisite to recovery and declaratory relief. As the court below recognized, the detailed provisions of § 113(g)(2) have a clear purpose: (1) to encourage CERCLA plaintiffs to come to court only after demonstrating their commitment to comply with the NCP; and (2) to avoid costly relitigation of threshold issues. Pet. App. 17-19. To allow petitioner to circumvent these safeguards in a CERCLA case by pursuing declaratory

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[10] *See* Declaratory Judgment Act of June 14, 1934, ch. 512, 48 Stat. 955 (codified as amended at 28 U.S.C. § 2201). In 1986, Congress amended CERCLA § 113 to its present form. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113, 100 Stat. 1613, 1647-52. It is worth noting that prior to that 1986 amendment, the courts appeared to allow for a declaratory judgment on future costs only after a finding of past costs that were NCP-compliant. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892-93 (9th Cir. 1986). The few district courts that reached the issue consistently denied declaratory relief when the plaintiff had not established a valid CERCLA claim for past costs. *See, e.g., Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1450 (S.D. Fla. 1984); *D'Imperio v. United States*, 575 F. Supp. 248, 251-52 (D.N.J. 1983).

relief under the Declaratory Judgment Act would undermine important statutory protections and frustrate the goals of CERCLA's carefully circumscribed declaratory remedy.[11]

CONCLUSION

Petitioner's disagreement with the decision below, and its arguments regarding what it would like the law to be, provide no basis for this Court's review. As shown above, there is no conflict among the circuits, and no conflict with any decision of this Court. Petitioner merely disputes the court of appeals' application of long-settled principles of statutory construction to resolve a narrow statutory question of first impression that is unlikely to arise with any frequency in the future. For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHRISTOPHER T. JOHNSON

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[11] Petitioner also errs in citing *United States v. USX Corp.*, 68 F.3d 811, 819 n.17 (3d Cir. 1995), for the proposition that "a plaintiff who has failed to comply with the NCP in its past response action may fully comply with the NCP in its future response action." Pet. 28. *USX* does not so hold. The entirety of the *USX* footnote cited by petitioner is as follows: "Essentially, § 113(g)(2) mandates collateral estoppel effect to a liability determination. Of course, a defendant would remain able to contest the amount of response costs or whether the work undertaken was consistent with the national contingency plan." 68 F.3d at 819 n.17. This footnote, which is itself pure dicta, does not state or imply the broad proposition asserted by petitioner.

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CITY OF COLTON,

Petitioner,

v.

AMERICAN PROMOTIONAL EVENTS, INC. – WEST, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITIONER'S REPLY BRIEF

I. CONTRARY TO THE RESPONDENTS' ARGUMENT, THE NINTH CIRCUIT DECISION BELOW WAS NOT CORRECTLY DECIDED.

This case involves the tension between two different rules fashioned by this Court for construction of potentially-conflicting statutes. On the one hand, this Court has held that "a precisely-drawn, detailed statute pre-empts more general remedies." *Hinck v. United States*, 550 U.S. 501, 506 (2007). On the other hand, this Court has held that "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective"; otherwise, one statute would impliedly preempt the other and "repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974); see *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-663 (2007); *Radnazower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). The respondents argue that the *Hinck* line of cases applies here, Res. Br. 16-18, and the petitioner argues that the *Mancari* line of cases applies. Pet. 22-23.

As a general rule, the *Mancari* line rather than the *Hinck* line should apply where potentially-conflicting statutes are capable of harmonious construction, because the *Mancari* line allows recognition of *all* statutes enacted by Congress and the *Hinck*

line does not. A rule of statutory construction that allows recognition of all congressional enactments is preferable to one that does not, assuming that the criteria of the former rule are met.

The statutes in this case – CERCLA section 113(g)(2) and the Declaratory Judgment Act – are capable of harmonious construction; thus, the criteria of the *Mancari* line of cases are met and recognition can be given to all congressional enactments applicable to the controversy. Specifically, section 113(g)(2) *mandates* the grant of a declaratory judgment – *i.e.*, the court "shall" grant a declaratory judgment – for recovery of "further" response costs. Since the declaratory judgment is mandatory, it logically applies only where the plaintiff has established its right to recover past costs, and does not apply where the plaintiff has not established this right. Since the petitioner in this case has not established its right to past costs, CERCLA section 113(g)(2) does not apply here, as the Ninth Circuit held. Pet. App. 16. The Ninth Circuit also held, however, that the Declaratory Judgment Act would otherwise apply because the case presents a "substantial controversy" between the parties. Pet. App. 7. Therefore, CERCLA section 113(g)(2) and the Declaratory Judgment Act are not in conflict as applied here, because the latter applies and the former does not, and the statutes can be construed harmoniously so that effect is given to each. Thus, the *Mancari* line of cases applies and the *Hinck* line does not.

In *Hinck*, this Court held that since Congress had granted the Tax Court specific jurisdiction over tax abatement claims, the Tax Court has exclusive jurisdiction over such claims; therefore, the federal district courts and Court of Federal Claims, although having general jurisdiction over certain federal law claims, do not have jurisdiction over tax abatement claims. *Hinck* holds that where two different statutes apply to the *same* subject matter, as in the case of tax abatement claims, the more specific provision prevails. *Hinck* does not suggest that where the statutes apply to *different* situations, as here, the more specific statute "preempts" the more general statute and effectively "repeals" it.

Notably, the respondents do not respond to the petitioner's argument that the two statutes in this case – CERCLA section 113(g)(2) and the Declaratory Judgment Act – apply to different situations and are capable of harmonious construction.

Instead, the respondents make other arguments in contending that *Mancari* and its progeny do not apply here. They argue, first, that *Mancari* "merely reaffirmed the principle that 'repeals by implication are not favored,'" and the Ninth Circuit "did not hold or suggest that CERCLA section 113(g)(2) has repealed the Declaratory Judgment Act in all of its applications." Res. Br. 20. *Mancari*, however, applies to *all* potentially-conflicting statutes that can be construed harmoniously, not just a statute that might impliedly repeal another statute "in all of its applications." For instance, this Court recently applied

Mancari in holding that the Endangered Species Act (ESA) does not impliedly repeal the Clean Water Act (CWA) as applied to federal approval of state permit programs under the CWA, and the Court did not suggest that the ESA might have impliedly repealed the CWA "in all of its applications." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-663 (2007). Thus, *Mancari* and its progeny fully apply here.

The respondents also argue that *Mancari* is distinguishable because *Mancari* and this case "involve entirely different and wholly unrelated statutory schemes." Res. Br. 20. Although the statutory schemes of the cases are different, *Mancari* established a general rule of statutory construction that applies to all potentially-conflicting statutes that can be read harmoniously, and this Court has applied this general rule of statutory construction in construing other federal statutes, as in *Home Builders*, *Radnazower*, *Watt*, *Posadas* and other cases cited above.

The respondents argue that Colton is attempting to "evade" CERCLA's limitation requirement and secure a "backdoor route" to declaratory relief. Res. Br. 17, 21. On the contrary, Colton is attempting to secure declaratory relief under a statute – the Declaratory Judgment Act – that directly applies here in the absence of the applicability of CERCLA section 113(g)(2). The respondents also argue that Colton's declaratory relief claim would "emasculate" CERCLA's scheme of "requir[ing] NCP compliance and a CERCLA-quality cleanup as a prerequisite" for recovering

response costs. Res. Br. 21. On the contrary, Colton fully agrees that – if it obtains declaratory relief for future response costs – it would nonetheless be required to comply with the NCP and produce a CERCLA-quality cleanup as a prerequisite for obtaining future cost recovery, as the federal courts have held. *United States v. USX Corp.*, 68 F.3d 811, 819 n. 17 (3d Cir. 1995) (plaintiff who obtains declaratory judgment under CERCLA must comply with the NCP in future cleanup as condition for recovering future response costs).

The respondents argue that the federal courts do not have subject matter jurisdiction over Colton's declaratory relief claim because the Declaratory Judgment Act is "remedial" and does not provide a separate basis for federal jurisdiction. Res. Br. 18. The Ninth Circuit rejected the respondents' jurisdictional argument below, and the issue is not properly before this court. The Ninth Circuit held, correctly, that it had subject matter jurisdiction over Colton's declaratory relief claim because the claim "is predicated on CERCLA, a federal statute providing a private right of action." Pet. App. 13-14. Although the Declaratory Judgment Act does not provide a separate basis for federal jurisdiction, the Act authorizes a declaratory judgment predicated on a right of action authorized under another statute, CERCLA, as the Ninth Circuit held.

The respondents argue that Colton's declaratory relief claim is not ripe, because Colton asserts only a "hypothetical" claim for future costs and a declaratory

relief award would "resolve only some, but not all," of the issues raised in the dispute. Res. Br. 19 n. 9. The Ninth Circuit rejected the respondents' ripeness argument below, and the issue is not properly before this Court. The Ninth Circuit held, correctly, that Colton's declaratory relief claim was ripe because the facts establishing the defendants' potential liability have already occurred – in that the perchlorate contamination has already occurred – and there is no dispute that Colton incurred past costs and will incur additional costs in the future. Pet. App. 9-11.

On the other hand, the respondents' argument that a plaintiff cannot pursue declaratory relief under the Declaratory Judgment Act would obstruct the broad goal of that Act, which "'creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it.'" *United States v. Doherty*, 786 F.2d 491, 498 (2d Cir. 1986), quoting Wright, The Law of Federal Courts § 100, at 671 (4th ed. 1983).

As one court has commented, it is "nonsensical" to require a plaintiff to establish his right to recover past costs as a predicate for a declaratory relief claim to recover future costs, because the declaratory relief claim "seeks to fix liability for *future* costs," not past costs. *Foster v. United States*, 922 F.Supp. 663, 664 (D. D.C. 1996) (original emphasis). As the court stated, "[w]hile a claim for recovery of past costs is logically

antecedent to a claim for future costs, it is not a prerequisite." *Id.*

Therefore, the Ninth Circuit decision below was not correctly decided.

II. CONTRARY TO THE RESPONDENTS' ARGUMENT, THIS CASE PRESENTS A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS.

The respondents argue that this case does not present a conflict among the federal circuit courts, because the Tenth Circuit in *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991), and the First Circuit in *United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001), did not hold – and at most stated in dictum – that plaintiffs can assert declaratory relief claims for future response costs without having established the defendants' liability for past costs, and that any statements to that effect in the decisions are not applicable here. Res. Br. 8-15.

Whether a conflict exists among the federal circuit courts primarily depends on whether the circuit courts themselves believe that a conflict exists, in terms of how they construe the opinions of other circuit courts and whether they regard such opinions as establishing precedents applicable to the case at hand. More specifically, the question depends on whether a reviewing circuit court regards another circuit court's opinion as establishing an applicable precedent but decides not to follow it, or instead

regards the opinion as *not* establishing an applicable precedent, because the opinion is either distinguishable or makes passing comments that lack precedential weight and value. Simply put, it is the jurisprudence of the circuit courts themselves – which this Court reviews on writs of certiorari – that largely determines whether an intercircuit conflict exists. If the circuit courts decide that a conflict exists but this Court declines to review the decisions because it believes they are distinguishable, the result will be to create confusion and uncertainty in the law. There, this Court should review circuit court decisions if the circuit courts believe that a conflict exists.

Here, the Ninth Circuit's jurisprudence clearly indicates that an intercircuit conflict exists. The Ninth Circuit stated that the issue is one of "first impression in this circuit," but that "[o]ur sister circuits have taken divergent approaches to this issue," in that some have "held or suggested that recoverable past costs are a sine qua non for declaratory relief under CERCLA" and others have "held or suggested that declaratory relief may be available even in the absence of recoverable past costs." Pet. App. 14-15 (citations omitted). Since the Ninth Circuit concluded that an intercircuit conflict exists, and did not attempt to distinguish the decisions with which it disagrees or suggest that the decisions were not applicable precedents, the Ninth Circuit's decision conflicts with the decisions of other circuit courts, as the Ninth Circuit candidly and openly acknowledged.

Closer analysis of *Tinney* and *Davis* reveals the existence of an intercircuit conflict, as the Ninth Circuit acknowledged. Turning first to *Tinney*, the Tenth Circuit stated that "a CERCLA plaintiff may be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that all of its claim response costs were incurred consistent with the NCP." *Tinney*, 933 F.2d at 1513. This conclusion directly conflicts with the Ninth Circuit's conclusion that a CERCLA plaintiff is not entitled to declaratory relief under these circumstances. Although *Tinney*'s analysis may have been dictum, in that the court denied declaratory relief in that case, the Ninth Circuit did not distinguish *Tinney* on that ground, and instead regarded *Tinney* as taking a "divergent approach[]" with which the Ninth Circuit disagreed. Pet. App. 15. The Ninth Circuit thus regarded *Tinney* as establishing an applicable precedent that the Ninth Circuit chose not to follow.

The respondents argue that *Tinney* is distinguishable because *Tinney* stated that a plaintiff can pursue declaratory relief for future costs without having established the defendants' liability for *all* or *some* past costs, whereas petitioner Colton has not established the defendants' liability for *any* past costs. Res. Br. 11. *Tinney* did not, however, suggest that its analysis applies only where the plaintiff has established liability for all or some past costs, and the logic of its analysis applies equally where the plaintiff has not established liability for any costs. The question whether the plaintiff can pursue declaratory relief without having established the defendants'

liability for at least some past costs goes to the question of whether the plaintiff's declaratory relief claim is ripe, and, as the Ninth Circuit held, petitioner Colton's claim is ripe because contamination has occurred and the petitioner has incurred past cleanup costs and intends to incur future costs. Pet. App. 9-11.

More importantly, *Tinney* explained that Congress' goal of encouraging private parties to clean up hazardous sites is furthered by allowing plaintiffs to seek declaratory relief for future costs without having established the defendants' liability for past costs. *Tinney*, 933 F.2d at 1513 n. 9. As the court stated, "[e]arly determination of a defendant's liability for as yet unproven CERCLA-cognizable costs . . . can speed the settlement process and thus promote Congress' goal of encouraging private parties to undertake and fund expedited CERCLA cleanups." *Id.* (citation omitted). Thus, *Tinney* recognized that CERCLA's goal of encouraging settlement is furthered by allowing plaintiffs to pursue declaratory relief claims that will establish whether the defendants are liable for costs, and the amount of their respective liabilities. *Tinney*'s explication of this congressional goal directly clashes with the Ninth Circuit's view that allowing the plaintiff to seek declaratory relief under these circumstances "would create little incentive for parties to ensure that their initial cleanup efforts are on the right track," Pet. App. 18, an argument repeated by the respondents in their response. Res. Br. 21. Thus, the Ninth Circuit's view of congressional goals conflicts with *Tinney*'s view of these goals.

Turning to *Davis*, the respondents argue that *Davis* held only that declaratory relief for contribution can be pursued under CERCLA section 113(g)(2) and did not hold that the same relief can be pursued under the Declaratory Judgment Act, and, to the extent that the decision may have suggested that such relief could be pursued, any such suggestion was dictum. Res. Br. 13-15.

In *Davis*, the plaintiff sought declaratory relief for contribution for its future cleanup costs under both CERCLA section 113(g)(2) and the Declaratory Judgment Act. The First Circuit held, first, that the plaintiff could seek declaratory relief under CERCLA section 113(g)(2), because that provision authorized declaratory relief for contribution claims, as well as for non-contribution claims. *Davis*, 261 F.3d at 45-47. The court held, separately, that the plaintiff could also seek declaratory relief under the Declaratory Judgment Act – even though the plaintiff had not incurred any past cleanup costs prior to the close of discovery – because there was an actual "case or controversy" between the parties. *Id.* at 47. Thus, the court held that the plaintiff could pursue declaratory relief under the Declaratory Judgment Act even though it had not established the defendants' liability for past costs at the time of its action, and its analysis was not dictum.

The respondents argue that *Davis* held that the plaintiff's right to pursue declaratory relief under the Declaratory Judgment Act was contingent on his right to pursue such relief under CERCLA section

113(g)(2). Res. Br. 15. In fact, *Davis* held that since the plaintiff had met the requirements for declaratory relief under section 113(g)(2), the plaintiff necessarily met the requirements for declaratory relief under the Declaratory Judgment Act. *Davis*, 261 F.3d at 45-47. *Davis* did not hold that the plaintiff's right to secure declaratory judgment under the latter statute was contingent on its right to secure such relief under the former.

Finally, the respondents argue that neither *Tinney* nor *Davis*, nor any other case than the Ninth Circuit decision below, has directly addressed the interplay between the Declaratory Judgment Act and CERCLA section 113(g)(2). Res. Br. 8-9. Logically, the only way that a CERCLA plaintiff can pursue declaratory relief for future costs if it does not have the right to recover past costs is under the Declaratory Judgment Act – assuming, of course, the correctness of the Ninth Circuit's decision that CERCLA section 113(g)(2) does not authorize such declaratory relief. Thus, although *Tinney* and *Davis* may not have directly discussed the interplay between the two statutes, their analyses were necessarily predicated on this interplay. Indeed, *Davis* expressly held that the Declaratory Judgment Act provides an independent basis of jurisdiction for pursuing declaratory relief under CERCLA, thus addressing, to that extent, the interplay between the statutes. Because of the intercircuit conflict concerning the interplay

between the statutes, this Court should grant review to resolve the conflict and prevent costly litigation.

CONCLUSION

The petition for writ of certiorari should be granted.

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